No. 04-15306

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al.,

Plaintiffs/Appellants,

v.

LINDA LINGLE, et al.,

Defendants/Appellees.

On Appeal from the United States District Court
for the District of Hawaii
Honorable Susan Oki Mollway, District Judge

APPELLANTS' REPLY TO ANSWERING BRIEFS

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APPELLANTS' REPLY TO ANSWERING BRIEFS

INTRODUCTION

In this brief, Appellants (collectively "ARAKAKI" or "Plaintiffs" or "Appellants") reply to the answering briefs of OFFICE OF HAWAIIAN AFFAIRS Defendants-Appellees (collectively "OHA") , STATE AND HHC/DHHL Defendants-Appellees (collectively "STATE/DHHL"), UNITED STATES Defendant-Appellee ("United States"), STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS and ANTHONY SANG, SR. Defendants-Intervenors-Appellees (collectively "SCHAA") and HUI KAKO'O etc. Defendants-Intervenors-Appellees (collectively "HUI").

POLITICAL QUESTION ISSUE

OHA, STATE/DHHL, SCHHA and HUI all argue that the District Court's "Political Question" order of January 14, 2004 (ER 28) was correct, for reasons different from, and inconsistent with, but as erroneous as those stated by the District Court.[1]

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[1] The District Court reasoned: "To determine the level of scrutiny applicable to these preferences, this court must determine whether Hawaiians should be treated as federally recognized such that the Morton analysis is applicable. On this point, notwithstanding OHA's argument, Congress has sent mixed signals." ER 28 at 19. "Whether Hawaiians should be treated as being recognized by Congress such that the more lenient review standard found in Morton should be applied to Plaintiffs' Equal

These four groups of Appellees apparently do not accept the District Court's conclusion that Congress has sent mixed signals. They all argue that Congress has *already* recognized Hawaiians as the equivalent of an Indian tribe and it would therefore be an improper political question for a court to challenge that conclusion. For example: OHA, in its brief at 8, says the central question raised by Arakaki's Complaint is whether federal courts should question Congress's determination that the United States has a "political" relationship with Native Hawaiians; it "would be improper for a court to question Congress's conclusions on these issues and, hence, the District Court acted properly in dismissing the Complaint 'because it raises nonjusticiable political questions." The STATE/DHHL brief says at page 6, "Congress has, in existing legislation, fully recognized and dealt with Native

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Protection challenge to programs being administered by OHA is an issue that is a nonjusticiable political question." ER 28 at 22.

The District Court is right that whether a group *should* be recognized as a tribe is a policy determination for the political branches. But whether a group *has* been recognized, if relevant, is a factual-legal determination which federal courts adjudicate under well-developed and familiar judicial standards. In *Price v. State of Hawai`i*, 764 F.2d 623, 626-28 (9th Cir. 1985) this Court held that the Hou Hawaiians had not been recognized. The District Court here, since it considered *Morton v. Mancari* relevant to the political question issue, should have heard Plaintiffs' counter motion for partial summary judgment and reached the same conclusion as *Price*, that Hawaiians have not been recognized as an Indian tribe. More properly, however, it should have held *Mancari* irrelevant because OHA and DHHL are state agencies, not quasi-sovereigns, as *Rice* held.

Hawaiians under their Indian Commerce Clause powers.", and at page 36, it is "beyond dispute that Congress has in fact exercised its Indian Commerce Clause authority to deal specifically with Native Hawaiians in dozens of statutes by repeatedly singling out Native Hawaiians for special treatment" and at page 38, "Congress … plainly has the authority to deal specially with Native Hawaiians as indigenous peoples, and in fact has done so." SCHHA's brief at 30 (courts are an improper forum for Arakaki's challenge to Congress' decision to recognize native Hawaiians and provide for their rehabilitation under the Hawaiian Homelands program... The United States has provided a matrix of some 150 laws --- in addition to the HHCA --- that have recognized and extended benefits to native Hawaiians and their descendants.") HUI brief at 8 seems to join the others (The United States has long recognized a substantial wrong has been done we should endeavor to repair).

Congress's "determinations" as to the constitutionality of its own acts are conclusions of law, not political questions. Whether the United States has a political relationship with Hawaiians[2] is a legal question. Whether

[2] Throughout this brief, ARAKAKI will use the term "Hawaiian" as defined in HRS §10-2, to mean any descendant of the people who lived in Hawaii in 1778, (the year that Captain Cook arrived). ARAKAKI will use the term "native Hawaiian" as defined in HRS §10 -2 to mean "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous

Hawaiians have the same legal status as federally recognized Indian tribes is a legal question. When the issue is whether a statute uses a suspect classification, such as race, or infringes a fundamental right, the courts do not defer to legislative findings but rigorously scrutinize them. The Appellees' own lengthy citations of federal laws demonstrate that this suit does not turn on any political question but on legal issues requiring interpretation of the Constitution and federal statutory and case law. It is OHA and the other Appellees, not ARAKAKI, who try to transform this civil rights suit into an Indian law case, even though no Indian tribes are involved. The United States Supreme Court in *Rice v. Cayetano*, 528 U.S. 495 (2000), has determined that the proper path of analysis does not require deciding whether Congress did or could recognize the class of Hawaiians as an "Indian tribe" in any sense of that term.

I. IN CASES INVOLVING ALLEGED RACIAL DISCRIMINATION, COURTS DO NOT ACCEPT LEGISLATIVE ALLEGATIONS OR CONCLUSIONS BUT RIGOROUSLY SCRUTINIZE THEM.

What deference, if any a court should accord legislative findings is not a question of "judicial notice" in the sense covered by the Fe deral Rules of Evidence but a question of constitutional law. For purely economic

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to 1778." It appears that OHA and the other Appellees sometimes use the term "Native Hawaiian" (note the capital N) to refer to the class defined as "Hawaiian" in HRS §10 -2.

legislation judged by the minimal scrutiny of the rational basis test, the courts are deferential to legislative findings unless they are plainly false or irrational. See, e.g. *Railway Express v. New York*, 336 U.S. 106 (1949). But when the issue is whether the statute uses a suspect classification, such as race, or infringes a fundamental right, the courts do not defer to legislative findings but rigorously scrutinize them. This is true even if the government denies in the statute itself that it is discriminating based on a suspect classification or infringing a fundamental right. Otherwise a legislature could utterly frustrate protection of constitutional rights by adding tendentious findings of "fact" to immunize its laws from independent judicial review. "Under our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace." *U.S. v. Morrison*, 529 U.S. 598, 615 (2000).

As the Supreme Court has explained, "[w]hatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 129 (1989). When a state "seeks to justify race-based remedies to cure the effects of past discrimination," the courts "do not accept the government's mere assertion" but rather "insist on a strong basis in evidence of the harm

being remedied." *Miller v. Johnson*, 515 U.S. 900, 922 (1995). This is because "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *City of Richmond v. J.A. Croson & Co.*, 488 U.S. 469, 501 (1989). "A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists." *Id.*

In *Croson*, the Supreme Court cited *Korematsu v. United States*, 323 U.S. 214, as an example of how constitutional rights can be violated with impunity when the courts are willing to defer to "fact-finding" by legislatures or executives to justify racial classifications. In *Korematsu* and *Hirabayashi v. United States*, 320 U.S. 81 (1943), the Supreme Court effectively upheld the internment of over 100,000 people without trial or conviction because it declined to "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population." *Hirabayashi* 320 U.S. at 99; *Korematsu* 323 U.S. at 219. The Justice Department asked the Court to take judicial notice of a mass of alleged facts about the Japanese. PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE INTERNMENT CASES, (1983) 196-97. The Court accepted findings in congressional hearings and a military report without rigorously scrutinizing them, *Hirabayashi* 320 U.S. at 96-102, *Korematsu*

323 U.S. at 218-19, and upheld the government "based upon the recognition of facts . . . which indicate that a group of one national extraction may menace . . . safety more than others," *Hirabayashi*, 320 U.S. at 101. In *Croson*, the Court cited Justice Murphy's *Korematsu* dissent, which did scrutinize the congressional and executive fact-finding and showed those findings to be tendentious efforts to justify an "erroneous assumption of racial guilt" based on "misinformation, half-truths and insinuations." *Id.* at 236, 239.

The courts will not allow a state to escape strict scrutiny of the basis for its classifications by citing congressional fact-finding. "If all a state . . . need do is find a congressional report on the subject to enact" a race-based program, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson* 488 U.S. at 504. When a state relies on a federal determination to justify a program using racial classifications, "the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Miller v. Johnson*, 515 U.S. at 922.

The Supreme Court in *Rice* has determined that the definitions of "Hawaiian" and "native Hawaiian" are racial classifications. These are the classes that the programs of OHA and the Department of Hawaiian Home

Lands are intended to benefit. Consequently, the "most rigid scrutiny" applies to any attempt to justify use of these classifications, whether by alleged fact-finding or otherwise.

The legislative statements that Appellees cite as showing Congress has recognized Hawaiians as the equivalent of an Indian tribe suffer from an additional defect: they are not part of the laws that Plaintiffs challenge and so are irrelevant to this case. Legislative statements in a preamble may help a court interpret the operative clauses of a particular statute by clarifying the legislative intent relating to the statute to which the preamble is attached, but they do not legislate facts or confer rights. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION, §20.03 (5th ed. 1993). A preamble does not clarify the intent of a legislature that enacted a different statute decades earlier. Congress enacted the Hawaiian Homes Commission Act in 1921. It became a Hawai`i state law in 1959 by virtue of the Admission Act, Act of March 18, 1959 Pub. L. 86-3, 73 Stat. 4, and the adoption of Hawai`i's state Constitution. HRS § 10-2 and other provisions defining "Hawaiian" and "native Hawaiian" in terms of racial ancestry were adopted in 19 79. When those laws were passed, neither Congress nor the State Legislature were relying on the "whereas" clauses found in the 1993 "Apology Resolution," Pub. L. 103-150, 107 Stat. 1510 (1993), or statements made in the later

statutes OHA and the others cite. The legislative statements that OHA asks this court to accept do not even clarify the legislative intent of the challenged laws.

Appellees rely chiefly on the "whereas" clauses of the preamble to the so-called "Apology Resolution." Because that res olution has no legally operative provisions and is not the subject of this lawsuit, these "whereas" clauses do not determine the intent or effect of the statutes that Plaintiffs do challenge. "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). Congress intended no change in the status quo by passing the Apology Resolution. The resolution expressly does not resolve any claims. 107 Stat. 1510 §3. The Senate Committee Report informed Congress that the resolution would have no regulatory impact and "will not result in any change to existing law." S. Rep. 123-126. There were no fact-finding hearings or floor debate about the accuracy of the factual claims. It can hardly be compared to the social science research used in *Brown v. Bd. of Education*, 347 U.S. 483, 494, n.11 or a "Brandeis brief."

The resolution's sponsor, Senator Daniel K. Inouye, assured the Senate that it is only "a simple resolution of apology." He emphasized this

point to reassure his colleagues that the resolution would have no effect on any controversial questions:

> As to the matter of the status of Native Hawaiians, as my colleague from Washington knows, from the time of statehood we have been in this debate. Are Native Hawaiians Native Americans? This resolution has nothing to do with that. This resolution does not touch upon the Hawaiian homelands. I can assure my colleague of that. It is a simple apology.

Congressional Record CONGRESSIONAL RECORD Vol. 139 at S14477, S14482 (Oct. 27, 1993). Thus, the Resolution has no bearing on whether "Hawaiians" or "native Hawaiians" are like Indian tribes and no bearing on issues relating to the Hawaiian home lands.

The Supreme Court in *Rice* demonstrated how to deal with the Apology Resolution and the other laws that OHA cites: the Court cited the resolution but decided the case based on the facts in the record and its own determination of relevant historical facts from standard historical treatises and legal sources. 528 U.S. at 489-507. In their briefs, the State, OHA, and Hawai` i's congressional delegation had all urged the Court to accept as definitive the assertions in the whereas clauses of the Apology Resolution and similar statements in preambles to other laws, including all the laws that OHA cites here which had been enacted at the time of briefing. State's Respondent's Brief, 1999 WL 557073 at 5-8, 30, 48-49; OHA's Amicus Brief, 1999 WL 557287, at 4-6, 16; Brief for the Hawai` i Congressional

Delegation, 1999 WL 557289 at 13-16 and Appendix A (citing scores of statutes). However, the Supreme Court did not defer to these legislative statements but made its own independent judgments. The Court did not even rely on the Apology Resolution to establish the State's intent in enacting the challenged statutes, which is hardly surprising given that it was enacted by Congress long after the State Legislature had enacted HRS §10-2 and related laws.

The State and OHA relied on the Apology Resolution and findings in other laws again in *Arakaki v. State*. They added citations to the Hawaiian Homelands Homeownership Act of 2000, Pub. L. 106-568, §202, Pub. L. 106-569, §512, 25 U.S.C. §4101 note, and the Native Hawaiian Health Care Act, 42 U.S.C. §11701, which were enacted after *Rice* was decided. Once again, they urged the court to unquestioningly accept the findings in the preambles to these laws. But the District Court made its own determination to the extent it concluded that facts were relevant. In this suit Plaintiffs do not challenge the constitutionality of those two recent federal laws. (Neither do they concede that they are constitutional.) Statements in the preamble of those laws may be relevant to determining the intent of those statutes but that is not an issue here.

Other courts which have cited the Apology Resolution have decided that it has no legal effect. *Marsh v. Commissioner of Internal Revenue*, T.C. Memo 2000-11, 79 T.C.M. (CCH) 1327, T.C.M. (RIA) 2000-011, 2000 RIA TC Memo 2000-0011 (Tax Ct. 2000) (Apology Resolution is not remedial legislation and does not alter obligation of person of Hawaiian ancestry to pay taxes on income earned in Hawai` i);*State v. Lee*, 90 Haw. 130, 976 P.2d 444 (Haw. 1999) (Apology Resolution does not affect applicability of state law); *State v French*, 77 Haw. 222, 883 P.2d 644 (Haw. App. 1994) (same); *State v. Lorenzo*, 77 Haw. 219, 883 P.2d 641 (Haw. App. 1994) (same)

All of the laws cited by OHA, including the Native Hawaiian Education Act, Pub L. 107-110, have preambles that closely resemble each other and the "whereas" clauses of the Apology Resolution. Each repetition of this language is more remote in time from the challenged laws and more clearly an attempt to use post-hoc findings to shore up a race-based scheme from constitutional challenge.

II. DETERMINING WHETHER A GROUP HAS BEEN RECOGNIZED AS AN INDIAN TRIBE UNDER EXISTING LAW IS A LEGAL QUESTION, NOT A POLITICAL QUESTION.

OHA cites the leading case on the political question doctrine, *Baker v. Carr*, 369 U.S. 186 (1962) and discusses it only generally in one paragraph at page 19 of its brief. SCHHA's discussion at 14 is even more brief.

Baker summarized the modern understanding of the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court' s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question' s presence. The doctrine of which we treat is one of ' political questions,' not one of ' political cases.'

369 U.S. at 217.

Prof. Laurence H. Tribe summarizes the political question doctrine as focusing on "the inquiry into whether particular constitutional provisions yield judicially enforceable rights." TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 368 (2000). In *Baker*, the Court ruled that cases under the Equal

Protection Clause are justiciable because "[j]udicial standards under the Equal Protection Clause are well developed and familiar." 369 U.S. at 226. The Equal Protection Clause and the binding precedents interpreting it give sufficient guidance to decide this case, just as the Supreme Court decided *Rice*. Questions concerning the application of the Equal Protection Clause and the proper interpretation and relevance of the statutes and resolutions that OHA cites are questions within the competence of the courts to answer. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

There is no "Indian tribe" exception to this most fundamental principle of constitutional law. In *Baker v. Carr*, the Supreme Court specifically addressed this issue. It quoted from *United States v. Sandoval*, 231 U.S. 28, 46 (1913), which noted that Congress has discretion to decide when Indians deserve "release from (the) condition of tutelage" by the federal government, but explained that "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." The *Baker* Court added:

> Able to discern what is ' distinctly Indian,' *ibid.*, the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.

369 U.S. at 216-217.

Moreover, the courts "scrutiniz[e] Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." *Delaware Tribal Business Comm. v. Weeks*, 430 US 73, 84 (1977). *United States v. Sioux Nation*, 448 U.S. 371, (1980) (Indian political question doctrine laid to rest in *Delaware Tribal Business Comm.*).

In *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342 (7th Cir. 2001), the Court reviewed and affirmed the Interior Department's determination that a group claiming tribal status did not meet the applicable regulatory standards. In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the Supreme Court interpreted the relevant federal statute and determined that land held by an Alaskan village was not "Indian country" because the village and its land were not part of any "dependent Indian communities" within the meaning of the statute.

In *Price v. State of Hawai`i*, 764 F.2d 623, 626-28 (9th Cir. 1985), this Court held that a group of native Hawaiians, the Hou Hawaiians, who claimed to be an Indian tribe, did not meet the legal requirements for that status. Contrary to the suggestion in the heading in OHA's brief at 19 and citation of *Price* at 20, the Court did not rule in *Price* that "the Political Question Doctrine Bars Judicial Scrutiny of the Relationship Between Native Hawaiians and the United States." The Hou contended that they

were an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," *28 U.S.C. § 1362,* and hence may bring this suit under § 1362. This Court carefully analyzed the relationship and found the Hou ineligible.

> To allow any group of persons to "bootstrap" themselves into formal "tribal" status -- simply because they are all members of a larger aboriginal ethnic body would be to ignore the concept of 'tribe' as a distinct sovereignty set apart by historical and ethnological boundaries.

764 F.2d at 627. Here, OHA tries to "bootstrap" all Hawaiians [3] into "tribal status" simply because they are all members of an aboriginal ethnic body. That, as this Court said so explicitly, would be to ignore the concept of "tribe" as a sovereignty set apart by histori cal and ethnological boundaries.

> In summary, under both the BIA' s current regulations for determining eligibility for federal benefits and "privileges and immunities," *see 25 C.F.R. § 83.7*, and the BIA' s pre-regulation standard for recognizing a tribe, the Hou fail to demonstrate eligibility for recognition. In the absence of explicit governing statutes or regulations, we will not intrude on the traditionally executive or legislative prerogative of recognizing a tribe' s existence. *See United States v. Sandoval, 231 U.S. 28, 46, 58 L. Ed. 107, 34 S. Ct. 1 (1913)* (recognition of tribe is "to be determined by Congress, and not by the courts"); *United States v. Holliday, 70 U.S. (3 Wall.) 407, 419, 18 L. Ed. 182 (1865);* F. Cohen, *Handbook of Federal Indian Law* 4-5 (1982). We therefore hold that the Hou do not qualify for § 1362 jurisdiction.

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[3] Census 2000 tallied 401,920 persons claiming some degree of Hawaiian ancestry, about 40%, or 162,255, dispersed throughout all the other 49 states and about 60%, or 239,655, in Hawaii. FER 7-B, Exhibit B to DKT 302.

764 F.2d at 628. Thus, after finding that the Secretary had not recognized the Hou, and that the Hou did not qualify for recognition (i.e., it had not shown that it was a distinct community and exercises political influence or authority over its members, and that it has maintained these characteristics from historical times until the present), this Court declined to grant such recognition itself. See also Canby, *American Indian Law, 3rd Ed*. 1998 at 5 and 6 (Action of federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review, but noting that federal courts today will review grants or denials of recognition to determine whether DOI followed its own regulations and other controlling law, and adhered to the requirements of due process. A court may also order the executive branch of the federal government to honor tribal status for a particular purpose if that is deemed to have been the intent of Congress, also noting the government would not be permitted to confer tribal status arbitrarily on some group that had never displayed the characteristics of a distinctly Indian community citing U.S. v. Sandoval, 231 U.S. 28, 46 (1913),)

III. UNDER *RICE* , THIS COURT NEED NOT DECIDE WHETHER HAWAIIANS ARE AN INDIAN TRIBE TO DECIDE THAT THE CONSTITUTION BARS STATE AGENCIES, INCLUDING OHA AND DHHL, FROM DISCRIMINATING BASED ON RACIAL ANCESTRY.

OHA and the other Appellees also err when they characterize the question of whether Hawaiians have some special political status similar to a federally recognized Indian tribe as "the central issue raised by Plaintiffs." It may be the central issue in Appellees' defense, but ARAKAKI believes it is a red herring.

The central issue raised by Plaintiffs is the Defendants'-Appellees' denial of the equality of all of Hawai`i's people. Whatever the label or excuse, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice*, 528 U.S. at 517. The basic principle on which Plaintiffs ground their claim is that governmental "inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens." *Id.*

After *Rice*, the applicable constitutional test is whether the racially discriminatory programs run by OHA and the Department of Hawaiian Home Lands for the exclusive benefit of the racial classes of "Hawaiians" and "native Hawaiians" can be shown to be narrowly tailored to a compelling governmental objective. The Supreme Court in *Rice* determined that OHA is a state agency and the statutory definitions of "Hawaiian and

native Hawaiian are racial classifications subject to constitutional scrutiny. 528 U.S. at 514-16. See HRS § 10-2 (defining Hawaiian and native Hawaiian) and Hawaiian Homes Commission Act of 1920 ("HHCA") § 201(7).

In *Rice*, OHA and the State (through Governor Cayetano) made their "*Mancari* argument" that Hawaiians are an Indian tribe for constitutional purposes or somehow analogous to an Indian tribe so OHA and the State could exclude non-Hawaiians from voting in OHA elections. Respondent's Brief in *Rice*, 1999 WL 557073; OHA Amicus Brief in *Rice*, 1999 WL 557287. Backed by an amicus brief from Hawai` i's congressional delegation, 1999 WL 557289, the State cited nearly every resolution and statutory preamble they cite here in support of their theory that Congress has recognized a "special relationship" with Hawaiians that immunizes what would otherwise be race-based programs from strict scrutiny. They argued with skill and vigor. They lost.

Despite all the citations to preambles, resolutions, "whereas" clauses, and findings, the Supreme Court was unconvinced that the racial class of Hawaiians is an Indian tribe or had any special status that makes them analogous to a federally recognized, organized Indian tribe:

> If Hawaii' s restriction were to be sustained under *Mancari* we would be required to accept some beginning

> premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State -- and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993 -- has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes.

528 U.S. at 518-19. The Court concluded that it could "stay far off that difficult terrain, however," because it rejected the government's analogy between OHA and a tribal government:

> If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.

528 U.S. at 520. Because OHA is a state agency, the Constitution applies to OHA and prohibits the racial restriction at issue. DHHL is also a state agency to which the Constitution applies with equal vigor.

The Court also rejected the analogy between OHA and the Bureau of Indian Affairs ("BIA") in *Mancari*. OHA tried to argue that it is a kind of BIA for Hawaiians and because *Mancari* had allowed the BIA to extend a racial preference for Indians, OHA could have racial preferences for Hawaiians. The Supreme Court rejected that argument and strictly limited

Mancari, saying that 'the case was confined to the authority of the BIA, an agency described as "*sui generis*" in *Mancari* itself, 417 U.S. at 554. *Accord*, *Arakaki I* Order at 26 (*Mancari* carefully limited).

Once the court had rejected these two analogies about OHA itself, the case came down to the straight-forward constitutional rule that a state cannot use race to deny anyone the right to vote in any state election. The possible tribal status, quasi-tribal status, constructive tribal status, or analogous-to-tribal-status of Hawaiians simply did not matter.

Like *Rice,* this is an equal protection case, not an Indian law case. The State of Hawai`i is obliged to treat its citizens equally, regardless of ancestry, when it allocates its public lands and revenues as well as when it holds elections.

IV. NEITHER THE PROPERTY CLAUSE NOR THE ADMISSION CLAUSE IMMUNIZE DHHL OR OHA FROM REVIEW.

SCHHA at 13 – 30 of its brief advances a novel but erroneous theory that Congress's exercises of powers under the Property Clause and the Admission Clause render the challenge to Hawaiian Homelands a political question. SCHHA argues they are not only immune from all judicial review, but also immunize any state action connected to them.

A. Congressional Exercises of Power Under the Property Clause are Subject to Judicial Review.

In its Property Clause argument, SCHHA contends that there can be no judicial review of any congressional exercise of the Property Clause power or of any state action that related to such an exercise. SCHHA Brief at 15, 19 (plenary authority of Congress under Property Clause is "without limitation"), 21 ("not subject to judicial second-guessing" and "beyond judicial scrutiny").

Through the Constitution, the American people have delegated to Congress certain powers but have limited those powers by the Bill of Rights and other constitutional protections. "Article I of the Constitution grants Congress broad power to legislate in certain areas" but "those legislative powers are . . . limited not only by the scope of the Framers' affirmative delegation, but also by the principle that they may not be exercised in a way that violates other specific provisions of the Constitution." *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

The Property Clause of Article IV, § 3, clause 2, is one of the legislative powers that the Constitution grants to Congress: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This is similar to Article I, § 8, clause 17, which empowers Congress to

regulate the District of Columbia and areas purchased in the states for federal use.[4]

Congress' power over the property of the United States is "plenary" but "plenary" power does not mean "absolute" power. See *Delaware Tribal Business Comm. v. Weeks*, 430 US 73, 84 (1977) (Congress' power over Indian tribes is plenary but not absolute). Prof. Laurence Tribe distinguishes between "internal" limits on a legislative power – those inherent in the grants of power themselves – and external limits – those imposed by the Bill of Rights and other specific constitutional constraints on congressional power. TRIBE, AMERICAN CONSTITUTIONAL LAW, 794-95 (2000). Glossing *United States v. San Francisco*, 310 U.S. 16, 29 (1940), he notes: "The power over the public lands thus entrusted to Congress is without [internal] limitations." *Id.* at 849 (2000). Congress' Property Clause power is plenary because it does not have internal limitations. SCHHA confuses this with

[4] Article I, § 8, clause 17 gives Congress power "to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

having no limitations at all. But unlimited power is the power of an absolute monarch, not of a constitutional legislature.[5]

Federal courts have the constitutional power to review all congressional legislation for compliance with Bill of Rights and other limits on congressional power. The Property Clause is no exception to this fundamental constitutional principle. It would be absurd to suggest that if Congress exercised its Property Clause power to restrict national parks for the exclusive use of one race, the courts would be powerless to test that law against the Constitution. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court scrutinized the segregated public school system that Congress had established in the District of Columbia and held it unconstitutional on the same day that the Court struck down segregated state schools in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954). Congress' power over the District of Columbia and over the public property on which the public schools were built did not immunize racial discrimination from judicial review. Similarly, in *Shapiro v. Thompson*,

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[5] SCHHA also seems to be confused about *United States v. Midwest Oil*, 236 U.S. 459, 474 (1915), which it quotes at page 16 of its Brief. SCHHA inserts an italicized sentence that does not appear in that case: "*Congress may prohibit absolutely or fix the terms upon which the property may be used.*"

394 U.S. 618 (1969), the Court reviewed and invalidated a residency requirement for welfare in District of Columbia that violated the equal protection component of the Fifth Amendment Due Process Clause for the same reasons that similar state requirements violated the Fourteenth Amendment.

Even the cases that SCHHA cites demonstrate that the courts can and do review the constitutionality of congressional exercises of the Property Clause. In *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976), the court noted that "determinations under the Property Clause are entrusted *primarily* to the judgment of Congress," but also noted in the same sentence that "courts must eventually pass upon them." (Emphasis added.)

The courts can also review state action that is allegedly based on the state having received land grants from Congress under the Property Clause. In *Stearns v. State of Minnesota*, 179 U.S. 223 (1900), Congress had used its Property Clause power (as well as its Admission Clause power) to grant Minnesota land in trust when it admitted Minnesota to the Union. Minnesota in turn granted some of the land to a railroad and agreed not to impose property taxes on that land. The state later revoked the property tax exemption. The Supreme Court reviewed the state's action for compliance with the trust and the Constitution. It held that Minnesota had impaired the

obligation of contracts in violation of the Contracts Clause, Article I, § 10, cl. 1. In addition, four justices found that the State had violated the Fourteenth Amendment Equal Protection Clause. *Id.* at 262 (White, J. concurring).

None of the other Property Clause cases that SCHHA relies on involved challenges arising under the Bill of Rights or equal protection; they were economic regulation cases. The courts generally apply a deferential standard of review for legislative policy decisions about economic regulation. *See Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959). Exercises of the Property Clause power are no exception. E.g. *United States v. San Francisco*, 310 U.S. 16, 29-30 (deferring to congressional policy judgment that its legislation would avoid monopoly). All of the cases that SCHHA cites in which the United States gave states land in trust for public purposes involved public uses, such as public schools, open to the entire public, without racial limitation. Only in Hawai` i did the United States give the State land (the Hawaiian home lands) with the requirement that it be managed in trust for the benefit of a racial class. See *Rice v. Cayetano*, 528 U.S. at 515 (definition of "native Hawaiian" in HHCA is definition of racial class). (More accurately, the United States in 1959 returned to Hawaii the lands which Hawaii had ceded to the United States in 1898, except for those

used for civil, military or naval purposes or assigned for the use of local government, which the United States had held subject to the requirement that all revenues and proceeds "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Included in the ceded lands returned to Hawaii in 1959 were the approximately 200,000 acres of Hawaiian home lands, which the United States in 1921 had set aside for native Hawaiians.)

The fact that the lands were returned to Hawaii with a racial string attached makes a difference. Racial classifications are strictly scrutinized, whether the actor is federal or state. The Fifth Amendment Due Process Clause imposes the same equal protection limits on the U.S. as the Fourteenth Amendment Equal Protection Clause imposes on states. *Adarand Constructors, Inc. v. Pena* 515 U.S. 200, 227 (1995). While Congress exercises over federal property the powers of a proprietor as well as of a legislature, even a private proprietor cannot impose a racially restrictive covenant on land. *Shelley v. Kramer*, 334 U.S. 1 (1948).

The Constitution applies fully and of its own force in Hawai` i, as it does in every state. As the Supreme Court said in *Rice*, 528 U.S. at 524,

"The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii."[6]

B. Congress Cannot Use its Property Clause Power to Exempt the State's Racial Discrimination in the Use of its Public Lands and Moneys for DHHL and OHA from Judicial Review Under the Equal Protection Clause.

The Hawaiian Homes Commission Act is no longer a federal statute. *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216, 1226 (9th Cir. 1978). When Hawai`i became a State the HHCA was removed from the United States Code. *Id.* The Admission Act, § 4, required the State to adopt the HHCA as state law. The State adopted it and incorporated it by reference into the State Constitution, Article XII. Admission Act, § 4 still prohibits the State from amending or repealing the HHCA without the consent of the United States and still requires that the proceeds and income from the about 200,000 acres of "available lands" (i.e., the Hawaiian home lands) be used "only in carrying out the provisions of said Act." By Admission Act §5(f) the United States

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[6] One of the Insular Cases was *Hawai`i v. Mankichi*, 190 U.S. 197 (1903), which involved a criminal trial that had occurred during the brief period between Annexation and the passage of the Organic Act (Act of April 30, 1900, c.339, 31 Stat. 141. *Mankichi* held that during that period most provisions of the Constitution applied in Hawai`i, but not the right to a unanimous twelve person jury. In the Organic Act, §5, Congress extended the full range of constitutional rights to Hawai`i and put Hawai`i on the path to statehood.

reserves the right to bring suit against the State for breach of trust if it fails to carry out the trust.

Admission Act, § 5(f) lists five permissible purposes for which the ceded lands may be used, four of them directed at the betterment of the general public without any racial restrictions (public education, farm and home ownership, public improvements and public use) and one "for the betterment of conditions of native Hawaiians, as defined in the" HHCA. §5(f) requires only that the "lands, proceeds and income shall be managed and disposed of for *one or more* of the foregoing purposes." (Emphasis added.) Thus, except for the HHCA, Act § 5(f) does not require that the state discriminate among its citizens based on whether or not they fall within the racial class "native Hawaiian." The state could, without violating the Admission Act, apply all the ceded land resources, except for the about 200,000 acres set aside for the HHCA, to any one or more of the four race-neutral statutory purposes.

However, the creation of OHA at the 1978 Constitutional Convention, subsequently purportedly ratified by the voters, was supported by the argument that "Section 5(f) of the Admission Act created a trust of these public lands *separate and apart from the lands defined as "available lands"* by Section 203 of the HHCA, 1920, as amended. Your Committee found

that the Section 5(f) trust created two types of beneficiaries and several trust purposes one of which is native Hawaiians of one-half blood." (emphasis added.) Volume I, Proceedings Constitutional Convention of Hawaii 1978, page 643, SCR 59.

On SCHHA's own account, the DHHL program was designed for a racial purpose: the "rehabilitation" of a 'dying race' – native Hawaiians". SCHHA Brief at 2. Even SCHHA does not refer to Hawaiians as "dying" without enclosing that scare word in quotations. That term was inapplicable even when the Act was passed; in the 1920 Census of the Territory of Hawaii, the total Hawaiian and part Hawaiian population was 41,750, an increase of 5.69% since 1896, the last census prior to annexation in 1898. (Exhibit 12 to DKT 262. Further Excerpts of Record, "FER" 5-12.) Persons of Hawaiian ancestry had increased in numbers and would continue to increase, but like so many other Hawaii citizens, they were (and often still are) marrying outside their ethnic group. Through intermarriage, the total number of part-Hawaiians has risen while the number of "pure" Hawaiians has fallen. OHA, NATIVE HAWAIIAN DATA BOOK Tables 1.1., 1.2 (1998); NORDYKE, THE PEOPLING OF HAWAI`I 30-42, 178-81 (1989) (FER 5-13.) Census 2000 tallied 239,655 persons who reported some degree of Hawaiian ancestry in Hawaii, almost 6 times the number in 1920. In addition, 162,255

resided in the other 49 states in 2000. FER 7-B. This very human pattern of choice gives great hope for the future and deserves government endorsement. Preserving racial purity is not a legitimate governmental purpose. It points us back to the worst times of our history, and deserves only condemnation. *Loving v. Virginia*, 388 U.S. 1 (1967). Yet the HHCA is expressly racial purity legislation. Section 209 of the Act in its original form prevented a spouse or child of a homesteader from succeeding to the homesteader's lease unless the spouse or child met the same 50% blood quantum standard applicable to the parent. This created a strong incentive in the parent to marry someone who also met the 50% standard in order to ensure the eligibility of their progeny to inherit the homestead. Recent legislation (Hawaii Session Laws 1981, c. 272, § 1) now permits a spouse, child or grandchild of 25% blood quantum to succeed to a spouse's or parent's lease, but that just pushes the problem down one generation; that successor must take thought for his or her children, and the incentive for racial purity still remains.

If, as Plaintiffs contend, the challenged programs violate the Equal Protection Clause, no federal legislation can save them. Congress cannot authorize a State to violate the Equal Protection Clause, nor can it immunize an unconstitutional program from judicial scrutiny. "Congress is without

power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *Townsend v. Swank*, 404 U.S. 282, 291 (1971). In *Saenz v. Roe*, 526 U.S. 489, the Supreme Court held that a state statute violated the Fourteenth Amendment by discriminating against recent immigrants to the state in receiving welfare benefits. The federal government had expressly authorized states to engage in such discrimination and had authorized federal property – money – to be used to support the state's program. The Supreme Court held that "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Id.* at 508.

Nor can Congress immunize governmental conduct from judicial review by declaring a trust or making an unconstitutional contract.

A trust cannot trump the Constitution. A term of a public trust which violates the Constitution is illegal and unenforceable. *Pennsylvania v. Board of City Trusts*, 353 U.S. 989, 77 S.Ct. 1281 (1957). Neither the federal nor the state government can write itself an exemption from constitutional equal protection by agreeing to act as a trustee for a racially discriminatory trust. Even if a trust is assumed to be valid, the courts can

still consider and invalidate State's use of race-based classifications to promote trust purposes. *Rice*, 528 U.S. at 521-23. Similarly, the government cannot by contract avoid the constitutional limits on its powers. Therefore, the Property Clause does not immunize OHA and DHHL from full constitutional scrutiny under the Equal Protection Clause.

C. Under the Admission Clause, Congress Cannot Impose Conditions that Put the New State on an Unequal Footing with the Other States.

SCHHA effectively concedes that Congressional exercises of power under the Admission Clause are subject to judicial review. SCHHA Brief at 22 and 23, citing *Coyle v Smith*, 221 U.S. 559 (1911). That concession is fatal to SCHHA's argument that it and HHC/DHHL were entitled, in any event, to be dismissed from the case before the Court had even considered the constitutional standard of review. Congress' exercise of its power under the Admission Clause to admit Hawai` i as a State of the Union does not immunize the challenged programs from judicial review. SCHHA's Admission Clause argument adds nothing to its failed Property Clause argument.

In *Coyle v. Smith*, the Supreme Court held that Congress's power under the Admission Clause is limited by the Equal Footing Doctrine: a new state can only be admitted on equal footing with all others. There is only

one class of states. In Prof. Tribe's terminology, the Equal Footing Doctrine is an "internal" or "structural" limit on Congress' power to admit states, arising from the nature of that power itself and the nature of the federal union. TRIBE, AMERICAN CONSTITUTIONAL LAW at 794-95. This limit is additional to the "external" limitations of the Bill of Rights, including equal protection, that restrain all of Congress' powers.

Because being a state is all or nothing, Congress cannot condition a prospective new state's admission on its agreement to enter the Union on terms different that the original states did. In *Coyle*, the Supreme Court ruled that the power of the new state "may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union which would not be valid and effectual if the subject of congressional legislation after admission." 221 U.S. at 573. In *United States v. Gardiner*, 107 F.3d 1314 (9th Cir. 1996), the court explained that the equality of the new state with the other states will "forbid a compact between a new state and the United States 'limiting or qualifying political rights and obligation'" (quoting *Stearns v. Minnesota*, 179 U.S. at 245. Thus, Congress cannot require or bargain for a state to promise that it will not change its capital; and any such requirement or bargain is void. *Coyle*, 221 U.S. at 577-78.

The Equal Footing Doctrine and the rule that Congress cannot authorize a state to violate the Equal Protection Clause both lead to the conclusion that a congressional admission act could not put a new state on an unequal footing by requiring it to deny on account of race the right to receive public benefits. See *Rice v. Cayetano*, 528 U.S. at 520 (Congress cannot authorize state to limit electorate by race).

D. Indigenousness has no legal significance.

SCHHA, citing cases from the 19th century, argues at 28 – 30 that, in addition to its powers under the Indian Commerce Clause, the United States as a superior and civilized nation has the duty and power of exercising a fostering care and protection over all dependent Indian communities.

The Supreme Court has abandoned the old paternalistic idea that Congress has powers over Indians because they are helpless savages and congenital "wards of the nation" who need the guiding hand of the Great White Father. See *United States v. Kagama*, 118 U.S. 375, 382-84 (1886); *United States v. Sandoval,* 231 U.S. 28, 39 (1913) (group can be identified as Indians by their "primitive modes of life," "superstition and fetichism," and "crude customs" that make them "a simple, uninformed and inferior people"). Today, "[i]t is now generally recognized that the [congressional] power derives from federal responsibility for regulating commerce with

Indian tribes and for treaty making." *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 and n.7 (1973) (contrasting *Kagama* with 'the modern cases"). The idea advanced back in 1886 in *Kagama*, 118 U.S. at 384, that Congress has extra-constitutional powers is contrary to the modern understanding that an act of Congress is invalid unless it is affirmatively authorized under the Constitution. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (Constitution creates a federal government of enumerated powers). TRIBE, AMERICAN CONSTITUTIONAL LAW at 796.

There are no exceptions to the rule that racial classifications by the federal and state governments trigger strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 229-30 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 496-97 (1989). In *Rice*, the Supreme Court rejected the *Mancari* defense because *Mancari* did not involve a racial class but rather a political class:

> Although the classification had a racial component, the Court found it important that the preference was "not directed towards a 'racial' group consisting of 'Indians,'" but rather *only to members of 'federally recognized' tribes*." 417 U.S., at 553, n. 24, 94 S.Ct. 2474. "In this sense," the Court held, "the preference [was] *political rather than racial* in nature." *Ibid.;* see also *id.,* at 554, 94 S.Ct. 2474 ("The preference, as applied, is granted to Indians *not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities* whose lives and activities are governed by the BIA in a unique fashion").

Rice, 528 U.S. at 519-20 (emphasis added). *Mancari* applies only to federally recognized Indian tribes, their members, and regulation of Indian tribes and members by the Bureau of Indian Affairs,[7] an agency the Court described as "*sui generis*" and distinguished from OHA and other state agencies.

Thus under *Mancari* and *Rice*, whether Hawaiians are "indigenous" and whether they have a so-called "special relationship" are of no legal significance and need never be decided. Because DHHL and OHA are state agencies, not an Indian tribe or the BIA, the Court need not consider whether Congress has treated or may treat Hawaiians or native Hawaiians as an Indian tribe or whether it may delegate that power to the State.

Mancari did not use the term "indigenous" but talked about Indian tribes and their members. "Indigenous" is too vague a term to be of any analytical value. It might be used to mean "originating in a place rather than coming from elsewhere" or "the first to arrive" or "marginalized by later

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[7] Alaskan native groups are not an exception to the rule that the *Mancari* test applies only to federally recognized tribal polities with government-to-government relationships with the United States. Over 200 Alaskan native villages are recognized on the official BIA list. 65 Fed. Reg. 13928 (2000). Alaskan native entities were added to the list in 1982, 47 Fed. Reg. 53130, 53134-35 (Nov. 24, 1982), before the 9th Circuit decided *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162, 1168 n. 8 (9th Cir. 1982) (quoting regulatory definition of "tribe" as including some Alaska native communities).

arrivals." It is at least debatable whether Hawaiians today are "indigenous" under any of these definitions. Their Polynesian ancestors, like their Asian, European and American ancestors, came to Hawai` i from elsewhere. No Hawaiians today can trace their ancestry back to the first canoe or even the first waves and centuries of settlement. Hawaiians are integrated into the culture, politics and economy of Hawai` i. Alternatively, "indigenous" may simply be used as shorthand for the racial groups of American Indian, Alaskan and Hawaiian ancestry, in which case it is a racial classification. Fortunately, on a correct reading of *Mancari* and *Rice*, there is no need for this Court to resolve this terminological tangle.

Similarly, under *Mancari*, as interpreted by *Rice*, alleging a vague "special relationship" is not enough to trigger the rational basis level of review. The test is whether there is a government-to-government relationship between the federal government and the government of a federally recognized Indian tribe. There is no such government to government relationship in this case. *Kahawaiolaa v. Norton*, 222 F.Supp. at 1219-21.

PLAINTIFFS' PUBLIC LAND TRUST CLAIMS

STATE/DHHL, OHA, SCHHA and the UNITED STATES argue that the District Court properly dismissed Arakakis' public land trust beneficiary claims because the 1898 Newlands Resolution did not establish a trust.

STATE/DHHL brief at 23: "1898 'trust' is not a true 'trust'. The word 'trust' was never used in the Resolution. The words of Resolution are so broad, they contradict any notion of a trust.

SCHHA brief at 10: Arakaki failed "to establish: that the Newlands Resolution established a trust in the first instance."

OHA brief at 36, 37: Quotes Dist Ct, Newlands Resolution does not appear to have actually created the trust alleged by Plaintiffs."

UNITED STATES brief at 40: "Plaintiffs fail to show that the Newlands Resolution created a trust to which they are a beneficiary and which the United States violated." At 44, "Plaintiffs fail to establish that the Newlands Resolution created the public trust they allege …"

V. THE PUBLIC LAND TRUST (SOMETIMES CALLED THE "CEDED LANDS TRUST") WAS FIRST ESTABLISHED BY THE NEWLANDS RESOLUTION IN 1898.

The United States, Territory of Hawaii, State of Hawaii, and OHA have all acknowledged that the public land trust "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes" was first established by the Newlands Resolution in 1898:

- Attorney General of the United States. 22 Op. Att'y Gen. 574, 576 (1899),

> The effect of this clause is to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the

same to the uses of the inhabitants of the Hawaiian Islands for educational and other public purposes.

(Ex. AA. filed March 4, 2002 DKT 4, ER FER?***)

- J. Garner Anthony, author of 1947 Hawaii Statehood bill and former Attorney General of the Territory of Hawaii, appearing with Territory of Hawaii Delegate Farrington before House Committee on Public Lands, House of Representatives, Washington, D.C. March 19, 1947,

Mr. Anthony. … Now, all this does is to say that we are presently debating what should be the ultimate policy of the Congress with respect to the public lands of Hawaii, which are held under the treaty of annexation, and the joint resolution in trust for the people of Hawaii.

…

Mr. Carroll. In other words, the failure of the Government to legislate in this matter revests the title in Hawaii?

Mr. Anthony. We already have the beneficiary title, Mr. Carroll.

Mr. Carroll. Where is there a legal opinion ever saying that this is held in trust?

Mr. Anthony. There is no such legal opinion, but the act of Congress, and also the treaty of annexation, says specifically that it shall be held in perpetuity for the benefits of the inhabitants of the Hawaii[an Is]lands. … showing clearly from the very beginning the intention expressed in every enactment that the people of Hawaii were the beneficiaries of the public lands of Hawaii.

(The report of the March 19, 1947 Congressional hearing is attached as an addendum to this brief.)

- Marguerite Ashford, Delegate to 1950 Constitutional Convention, former Commissioner Territorial Public Lands, Attorney for Territorial House or Senate each session 1934-53, first woman admitted to Order of the Coif, U. Mich; first

woman admitted to practice law in Hawaii, at Debate in Committee of the Whole on Hawaiian Homes Commission Act, Constitutional Convention of 1959, Territory of Hawaii, June 7, 1950, Honolulu, Hawaii, at page 659,

ASHFORD: … When we became a part of the United States, the United States had no public lands here except those specifically designated for defense and so forth. The public lands were ceded to the United States and accepted under the Newlands Resolution subject to a trust; that trust was recognized when we became an organized territory. The lands were put under our administration by the Organic Act. They remained our lands in the control of the United States pending the time we were admitted as a state.

…

In this case, however, the trustee of our lands, in returning them to us, is attempting to attach to them terms of trust as though it were the full order.

(The report of the Debates in the Committee of the Whole at the Constitutional Convention June 7, 1959 is attached as an addendum to this brief.)

- Opinion of Hawaii Attorney General Margery S. Bronster to

  Governor Cayetano July 17, 1995, fn 1, page 8,

  Section 5 essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900.

  (Ex. Y filed March 4, 2002 DKT 4 FER ___ ER?***.)

- United States Congress. Paragraph (12) of the Native Hawaiian

  Health Care Act, 42 U.S.C. §11701,

  Through the Newlands Resolution and the 1900 Organic Act, the United States Congress received 1.75 million acres of lands formerly owned by the Crown and government of the Hawaiian Kingdom and exempted the lands from then existing public land

laws of the United States by mandating that the revenue and proceeds from these lands be "used solely for the benefit of the inhabitants of the Hawaiian islands for education and other public purposes", thereby establishing a special trust relationship between the United States and the inhabitants of Hawaii.

- Office of Hawaiian Affairs. Appendix A to one of OHA's motions for partial summary judgment filed May 7, 1996 in OHA v. State, Civil No. 94-0205-01 entitled HISTORICAL BACKGROUND OF THE PUBLIC LAND TRUST, provides at page 1,

The history of the trust began with the cession of sovereignty by the Republic of Hawaii under the "Joint Resolution To provide for annexing the Hawaiian Islands to the United States" 30 Stat. 750, adopted by congress on July 7, 1898. Upon the annexation of Hawaii by the United States in 1898, all lands owned by the Republic of Hawaii were ceded to the United States. Id. This Joint Resolution provided that:

[a]ll revenues from or proceeds of the [public lands], except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Id. "The effect of [the foregoing language was] to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other purposes." Yamasaki, 69 Haw. 154, 159, 737 P.2d 446 at 449 (1987) (quoting 22 Op. Att'y Gen. 574 (1899)).

Also see page 2, under Organic Act ,"

These lands were exempt from the then existing public land laws of the United States by the issuance of this mandate which established "a special trust relationship between the United States and the inhabitants of Hawaii." 42 U.S.C. § 11701 (12) (1993).

See also page 3 under the discussion of the Admission Act, fn 2

Section 5 essentially continued the trust which was first established by the Joint Resolution in 1898, and continued by the Organic Act in 1900.

(Exhibit B filed 4/11/02 with DKT 88, Further Excerpts of Record "FER" 2-B.)

- Legislative Auditor, State of Hawaii. Final Report on the

  Public Land Trust, December 1986 page 10, under the heading,

  "The Public Land Trust", referring to §5 of the Admission Act,

  The requirement that lands returned to Hawaii via sections 5(b) and 5(e) be held in trust for the purposes enumerated was a continuation of the trust concept initially embodied in the joint resolution of annexation of July 7, 1898.

  (Ex. D filed 4/11/02 DKT 88, FER 2-D.)

- Auditor, State of Hawaii. A Report to the Governor and the

  Legislature of the State of Hawaii, Establishment of a Public

  Land Trust Information System, Phase One, March 2001 at 3,

  On April 30, 1900, the Organic Act that formally made the Hawaiian Islands a territory of the United States substantiated the ceded lands trust provisions introduced in the Joint Resolution.

  (Ex. E filed 4/11/02 DKT 88, FER 2-E.)

- Hawaii Supreme Court. "The concept that the public lands of Hawaii were impressed with a special trust, implicit in the joint resolution of annexation, See 22 Op. Atty Gen. 574, was reiterated in section 5(f) of the Admission Act." *Trustees of OHA v. Yamasaki,* 69 Hawaii 154, 160 (1987).

- Hawaii Supreme Court. "The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawaii." *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977). "Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time." Id at 125.

VI. A TRUST MAY BE CREATED BY TRANSFERRING PROPERTY WITHOUT USING THE WORD "TRUST" AND EVEN WHEN BROAD POWERS OF MANAGEMENT ARE GIVEN. HAWAII INTENTIONALLY REQUIRED THE TRUST FOR PRACTICAL REASONS.

As to the STATE/DHHL's brief at 23 argument that the 1898 Newlands Resolution never uses the word "trust", "A trust may be created

although the settlor does not use the word "trust" and the fact that the settlor uses the word "trust" does not necessarily indicate that a trust is intended." Restatement of Trusts 2d, §24 (Illustration: 1. A, the owner of certain bonds, declares that he holds the bonds "for the use of B" or "for the benefit of B." In the absence of a contrary intention, A holds the bonds in trust for B.). See also Bogert, The Law of Trusts and Trustees, Revised Second Edition, 1984, §45, p. 466 et seq., "Proof of the use of formal or technical language is not a pre-requisite. All that is necessary is that the settlor express an intent that the trustee is to have the functions and duties which are incident to trusteeship. Thus in some cases there has been a finding of an expression by the settlor of an intent to have a trust, even though he used language seemingly appropriate to an absolute gift, to the creation of a life tenancy, to the assignment of a chose in action, to the creation of an interest on condition subsequent, to the making of a contract, or to executorship, agency, guardianship, or partnership, and did not use the words "trust" or "trustee".

The Republic of Hawaii's offer to cede its public lands to the United States on the condition that all revenues or proceeds of those lands, except for those used for civil, military or naval purposes of the United States or assigned for the use of local government, "shall be used solely for the

benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes" and the express acceptance of the offer subject to that condition by the United States was a straightforward manifestation of intention and agreement by both governments to create the public land trust.[8]

Nor does the fact that the Newlands Resolution gave Congress broad power to manage and dispose of the lands, negate, as the STATE/DHHL brief at 23 asserts, the intent to create a trust. (The UNITED STATES brief at 43 also cites and emphasizes the clause in the Newlands Resolution "which conferred upon Congress the sole and absolute authority to provide for the management and disposition of these lands.") Indeed it is customary to grant trustees broad powers to manage, sell, buy, lease, mortgage and otherwise deal with land held in trust. See for example the Uniform Trustees' Powers Act, adopted in Hawaii by HRS Chapter 554A which gives

[8] The Republic of Hawaii's requirement that the United States hold the ceded lands (except for the parts used by the U.S. for military or civil purposes) in trust for the inhabitants of Hawaii had historic precedent and significant practical consequences for the future State of Hawaii. The United States held a similar trust obligation as to the lands ceded to it by the original thirteen colonies. Once those new states were established, the United States' authority over the lands would cease. Other future states, Nevada for example, did not have such an arrangement. As the Ninth Circuit held in *U.S. v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997), the United States still owns about eighty percent of the lands in Nevada and may sell or withhold them from sale or administer them any way it chooses.

such powers to *all* trustees "unless limited in the trust instrument and except as is otherwise provided by law." §554A-2 HRS.

VII. THERE IS ONLY ONE HAWAII PUBLIC LAND TRUST. ARAKAKI HAS CONSISTENTLY SOUGHT TO ENFORCE THE LEGAL TERMS OF THAT TRUST.

OHA's brief at 37 and SCHHA's at 20, 22 argue that the District Court was correct in the May 8, 2002 order (ER 5) at 21 that Plaintiffs have changed their position as to the trust they are challenging.

ARAKAKI has consistently maintained there is only one public land trust in Hawaii. It was established in 1898 as a race neutral public trust; breached by the Trustee, the United States, in 1921 by adoption of the HHCA; breached further by the United States in 1959 by imposing the HHCA on Hawaii as a condition of statehood; breached further and still being breached by the United States by prohibiting, and continuing even now to prohibit Hawaii from repealing or changing the HHCA without its consent; breached by the State of Hawaii as Trustee by adopting the HHCA in 1959, further breached by the State of Hawaii as Trustee in 1978 by enacting the OHA laws and by implementing and continuing even now to implement both the HHCA and the OHA laws. The facts and legal theories in support of ARAKAKI's breach of trust claims are spelled out specifically

and in some detail in the Complaint (ER 1). ARAKAKI stands by that Complaint today.

VIII. THE FACT THAT THE TRUSTEE MAY SPEND FOR OTHER PURPOSES DOES NOT DEPRIVE ARAKAKI OF STANDING.

STATE/DHHL argues at page 23 of its brief, "plaintiffs do not and cannot show that if the moneys currently flowing to benefit Hawaiians were stopped, plaintiffs would directly benefit, however minutely, from that money savings, as the savings could be diverted to other programs or uses from which plaintiffs might derive no benefit (e.g., say, educational assistance to the blind). That argument is not valid.

"The fact that the trustees may, consistently with §5(f), spend the income for purposes other than to benefit native Hawaiians does not deprive Price of standing to bring his claim. We recently considered this very question and determined that allegations such as those Price has made are sufficient to show an 'injury in fact'". See *Price*, 764 F.2d at 630. In addition, allowing Price to enforce §5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust. See Restatement 2d of the Law of Trusts, §214(1), comment a; see also id. at §391 (stating that plaintiff with "special interest"

beyond that of ordinary citizen, may sue to enforce public charitable trust)." Price v. Akaka, 928 F.2d 824, 827 (1990).

IX. THE EXISTENCE OF A TRUST RELATIONSHIP HAS AN ATTENDANT RIGHT OF THE AGGRIEVED BENEFICIARY TO SUE THE TRUSTEE FOR BREACH OF TRUST.

The United States brief, starting at 45, cites five of the six Ninth Circuit Court decisions cited by Plaintiffs in their opening brief (at 24 and 25) recognizing that beneficiaries of Hawaii's public land trust , the very same trust at issue in this case, have standing to sue state trustees for breach of trust. But, argues the United States' brief, Plaintiffs' claim is meritless and they have no standing because they claim "the trustee must refrain from complying with an illegal term" of the trust. (U.S. brief, 47.) No mention is made of the Restatement of Trusts "§166 Illegality (1) The Trustee is under a duty to the beneficiary not to comply with a term of the trust which he knows or should know is illegal"; nor the trustee's "duty to deal impartially with beneficiaries"; nor that a trustee breaches the trust if he "violates any duty he owes to the beneficiary." (Opening Brief, 26.)

The United States brief also argues, at 46, that §1983 provides a claim only against those acting under color of state law, not against the federal government. True, but the Supreme Court's recognition of *Bivens* actions is

often treated as roughly analogous to the causes of action provided by Congress in the federal civil rights acts, particularly 42 U.S.C.A. §1983. The Supreme Court has noted that the constitutional injuries made actionable by 42 U.S.C.A. §1983 are of no greater magnitude than those for which federal officials and agents maybe responsible under *Bivens* because the pressures and uncertainties facing decision makers in state government are similar to those affecting federal officials and agents. *Butz v. Economou*, 48 U.S. 478 (1978).

> "it would be ' incongruous and confusing, to say the least' to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution." *Economou v. U. S. Dept. of Agriculture*, 535 F.2d, at 695, n. 7, quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 456 F.2d 1339, 1346-1347 (C.A.2 1972) (on remand).

Id. at 499

> Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

Id. at 504.

At 48, just two pages after it has cited five Ninth Circuit decisions upholding beneficiaries' standing to sue for breach of Hawaii's public land trust, the United States' brief asserts that "Plaintiffs are not proceeding on the basis of any direct injury to them. … they ha ve not alleged that they applied for and were denied benefits because they were not native Hawaiians." Omitted from the argument is that none of the plaintiffs in the five cases cited "had applied for and were denied benefits" nor did any of them complain of any injury other than the wrongful diversion of trust lands (1.75 acres of submerged lands in *Napeahi*; 25 acres of trust land used for a a flood control project in *Keaukaha*) or wrongful diversion of trust moneys (in the three *Price* cases), the very same types of injuries alleged by Plaintiffs here, that the State as trustee is wrongfully diverting trust lands and moneys and thereby injuring Plaintiffs as beneficiaries.

X. THE CAUSAL CONNECTION.

Part I B at page 20 of the brief of the United States begins with the heading, **The United States is Not the Cause of Plaintiffs' Alleged Injury**.

The following evidence shows otherwise:

• In 1921 the United States created the Hawaiian Homes Commission Act ("HHCA") for the sole purpose of specially benefiting persons defined explicitly by race ("The term 'native Hawaiian' means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." §201(7) HHCA);

• In 1959 the United States required the State of Hawaii to adopt the HHCA as a condition of statehood (Admission Act §4);

• The United States prohibits the State from amending or repealing the HHCA without the consent of the United States (*Id.*);

• The United States requires all proceeds and income from the about 200,000 acres set aside by HHCA to be used "only in carrying out the provisions of said Act." (*Id.*); and

• The United States reserves the right to sue the State of Hawaii for breach of trust if it fails to carry out the HHCA (*Id.* §5(f)).

Among its other harmful consequences, the Admission Act §4 directly causes injury to each Plaintiff as a beneficiary of the public land trust by requiring that, "all proceeds and income from the 'available lands', as defined in said Act [the about 200,000 acres of ceded lands Congress set aside for the DHHL], shall be used only in carrying out the provisions of said Act." That federal law, §4 of the Admission Act, deprives each

Plaintiff of his or her share of the benefit of the proceeds and income of those 200,000 acres. The DHHL 2003 Annual Report (available on the internet at www.state.hi.us/dhhl/) shows receipt of revenues for the year ended June 30, 2003 of $5,385,979 from General leases and $1,708,362 from Licenses and permits. But for the HHCA, brought to us and still mandated under threat of suit for breach of trust by the most powerful nation in the world, that $7 million plus would be available annually to use for Plaintiffs and all public land trust beneficiaries impartially. The Admission Act's §4 prohibition against repeal or amendment of the HHCA , without the consent of the United States, ensures that such injury to each Plaintiff will continue to occur annually into the indefinite future. The only way to fully redress this continuing injury is to: reverse the dismissal of Plaintiffs' claims against the United States; reinstate it as a party; declare the program invalid; tell the other Defendants to stop doing it; and tell the United States to stop holding the sword over their head and telling them they have to do it.

PLAINTIFFS TAXPAYER CLAIMS

XI. PLAINTIFFS' INCREASED TAX BURDEN IS ALSO FAIRLY TRACEABLE TO THE IMPOSITION OF HHCA.

The built-in drain of public land trust money resulting from §4 is only part of the ongoing injury to Plaintiffs and others similarly situated. There

are also the taxes. The United States asserts at page 20 that the Admission Act does not require the State to tax Plaintiffs. 'The federal statutes that Plaintiffs challenge do not require that the State impose any specific tax on its citizens nor incur any particular expenditure of State tax revenue. … Plaintiffs do not argue, nor could they, that the HHCA or the Admission Act requires the State to tax Plaintiffs or expend State tax money." But when the allegations of the complaint are presumed to be true and construed favorably (See standard of review, Opening Brief at 14), the tax monies appropriated annually (DHHL received Appropriations of $1,344,603 for FYE June 30, 2003. *Id*.) are fairly traceable to the United States' imposing the HHCA on Hawaii.

Plaintiffs allege injury not only as trust beneficiaries but also because federal laws, requiring the State to engage in racial discrimination, increase their tax burden while denying them any of the benefits of those additional taxes. (Complaint, ¶ 58, ER 1.) See also the declarations of each Plaintiff filed March 4, 2002, DKT 4 (some of them are included in FER 1), declaring under penalty of perjury that, among other things, as a result of the federal and state laws, he or she is harmed as a beneficiary of the public land trust, and his or her tax burden is increased by, the appropriations and diversions

of public lands and revenues to OHA and DHHL, but "I am denied any benefit of those appropriations solely because of my ancestry."

The United States presented no affidavits, declarations, or evidence of any kind to contest either the allegations of the complaint or Plaintiffs' declarations tracing their injuries to the federal laws.

The trial court, when it dismissed Plaintiffs' claims against the United States for the second time on November 21, 2003 (ER 14) had before it a record showing the State of Hawaii had appropriated from and obligated the General Fund for HHC/DHHL in the total amount of $263,199,310 in the seven fiscal years through June 30, 2002, in addition to the land revenues diverted to HHC/DHHL which brought the total harm to the State treasury during those seven years to $430,599,594. (Exhibit 6 filed 9/18/02 with DKT 208, FER 3-A). Also undisputed was, and is, the fact that the United States had held legal title, subject to the terms of the 1898 Newlands Resolution, to all the ceded lands, including the about 200,000 acres the United States set aside for DHHL, from 1898 until 1959 when the legal title to most of the ceded lands was returned to Hawaii. For 38 of those years, from 1921 until 1959, the Hawaiian home lands program was operated under the direction, control, authority and laws of the United States. Accepting as true the allegations of the complaint in that setting and construing them

favorably to Plaintiffs, it is plausible that, during the 38 years when DHHL was operated completely under the authority of the United States, the program was not self-sustaining and required regular appropriations from the Territory of Hawaii's General Fund. (Money is obviously needed for infrastructure and improvements to make the land usable and for administration.) The June 7, 1950 Debates in the Committee of the Whole on the Hawaiian Homes Commission Act, at the 1950 Constitutional Convention include considerable discussion about the "great need for needed appropriations to carry out the work of the Hawaiian Homes Commission." (A copy of the report of the debates of June 7, 1950 is in the Addendum to this brief. See page 663 for the discussion of whether to add to the proposed Hawaii constitution a requirement that appropriations for administration expenses of the HHC shall be "not less than" will a ccord equal treatment with other departments. "Now in the past the legislature has been very generous to the Hawaiian Homes Commission program. It has not only appropriated additional sums for administrative purposes, but considerable sums for development.")

It therefore *must* have been obvious in 1959, when the Admission Act required Hawaii to adopt the HHCA, that the new State legislature would have to continue to subsidize the Hawaiian home lands program with tax

dollars. Not surprisingly, that actually happened and is still happening today. Thus, the dismissal of the United States should be reversed so that, if a genuine dispute should arise about it, the question of whether Plaintiffs' injuries as state taxpayers are fairly traceable to the United States, can be adjudicated based on evidence.

XII. IT HAS BEEN STIPULATED THAT THE STATE APPROPRIATES GENERAL FUNDS TO DHHL AND OHA.

The brief of the United States discusses, at 20 – 30, Ninth Circuit and other decisions on state taxpayer standing and then summarizes at 31, "In sum, Plaintiffs' status as state taxpayers provides no basis to sue the State of Hawaii for the State's expenditure of non-tax funds." Doubtful as that general proposition is[9], Plaintiffs still have taxpayer standing to sue for expenditure of *tax* funds and there can be no genuine dispute that the State does so. It has been stipulated that,

---

[9] "taxpayer standing, by its nature, requires an injury resulting from a government's expenditure of tax revenues" *Doe v. Madison School District*, 177 F.3d 789 (9th Cir. 1999). Plaintiffs challenge the unconstitutional conduct which causes the additional tax expenditures. In *Doe* the Ninth Circuit *en banc* thoroughly reviewed the rules of taxpayer standing and made it clear that state taxpayers may challenge a variety of improper actions which could have a detrimental effect on the public *fisc*, resulting in increased taxes. This is covered in Appellants' Opening Brief Part III.A. It will not be repeated here because, in any event, the State has and continues to spend tax moneys for DHHL, fairly traceable, as already shown, to the federal government's unconstitutional imposition of the HHCA on Hawaii.

12./46 The legislature has appropriated varying sums of money from the General Fund for OHA for most of the years since 1980.

13/47 The legislature has appropriated the following sums of money from the General Fund for OHA for the fiscal years beginning July 1, 1997 and ending June 30, 2003: 1997-98 -- $2,772,596; 1998-99 -- $2,710,897; 1999-00 -- $2,550,922; 2000-01 -- $2,519,663; 2001-02 -- $2,619.663; and 2002-03 -- $2,532,663.

14/60 For the following fiscal years, the legislature has appropriated the following sums of money from the General Fund for the Department of Hawaiian Home Lands: 1999-2000 -- $1,298,554; 2000-01 -- $1,298,554; and 2001-02 -- $1,359,546.

STIPULATION AS TO CERTAIN FACTS, etc. filed July 8, 2002, Entry date July 10, 2002, DKT 172 (ER 7).

The General Fund consists almost entirely of tax moneys. For example, in FYE 6/30/02 total revenues to the State of Hawaii General Fund were $3.242 billion. $3.041 billion of that, or over 93%, was tax revenue. (ER 20.) The pattern in FYE 6/30/02 was the same. Tax revenues were over 93% of total General Fund revenues. (ER 21.)

The stipulation covers only a small part of the total harm to the State treasury caused by the two programs. Researching only part of their history to date shows the estimated total cost, including amounts paid directly to DHHL and OHA by the State, debt service on bonds whose proceeds went to them, loss of revenues and investment earnings, has been about $1 billion. (Plaintiffs' itemized compilations based on appropriation bills and official

financial statements were filed 9/18/02 as Exhibits A and B to DKT 208, FER 3-A and 3-B.)

The stipulation shows appropriations for DHHL average about $1.3 million per year and for OHA about $2.6 million per year. Although each Plaintiff's tax burden is increased by the appropriations for DHHL , every Plaintiff is denied any benefit of those appropriations solely because of his or her ancestry. All but three of the Plaintiffs (those with some but less that half Hawaiian ancestry) are denied the benefit of the appropriations for OHA solely because of his or her ancestry.[10] This is not a generalized burden shared in common with all taxpayers. As previously noted, the 2000 Census tallied about 240,000 persons in Hawaii who reported some degree of Hawaiian ancestry. Spreadsheet of Census 2000 data filed 10/28/03. DKT 302, (FER 7-B.) DHHL serves only "native Hawaiians", descendants of not less that one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. None of the Plaintiffs, even those of some

[10] OHA is required to use moneys it receives from the public land trust only for "native Hawaiians". (ER 15.) These are the bulk of moneys going to OHA. (ER 17.) See *Rice*, 528 U.S. at 523. Since under the OHA laws, the three Hawaiian Plaintiffs are not eligible for the benefit of these funds, they have standing to challenge these distributions to OHA. As to the appropriations of General Funds, i.e., tax moneys, to OHA, they may be used for Hawaiians, so the three Hawaiian Plaintiffs, being potential beneficiaries, do not have standing to challenge them.

Hawaiian ancestry, meet that definition. Census 2000 did not tabulate the number of "native Hawaiians", nor has any other official done so to Arakaki's knowledge. The waiting list for homesteads as of June 30, 2003 consisted of 20,489 applicants and there were 7,350 homestead lessees on all the islands according to the DHHL 2003 Annual Report at page 6. (www.state.hi.us/dhhl/). Whatever the actual number, whether it is less than 28,000 or as much as 80,000, none of the "native Hawaiians" would have standing as taxpayers to challenge the constitutionality of DHHL because each of them would be a potential DHHL homestead lessee. Therefore the concrete, particularized injury in fact suffered by Plaintiffs as state taxpayers because of the DHHL laws (and all but three of the Plaintiffs because of the appropriations from the General Fund to OHA) would also be suffered by most, but not all, taxpayers of Hawaii. The fact that many others are also injured by the discriminatory laws is no reason to deny standing. Each Plaintiff has a direct stake, even though small, in the litigation. That distinguishes him or her from persons who just have an interest, a generalized grievance.

In *U.S. v. SCRAP,* 412 U.S. 669, 93 S.Ct. 2405 (1973), the Supreme Court said,

> But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of

> the cases on which we relied in *Sierra Club* demonstrated the patent fact that persons ***688** across the Nation could be adversely affected by major governmental actions. …To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion. (internal citations omitted.)
>
> ' Injury in fact' reflects the statutory requirement that a person be ' adversely affected' or ' aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, and a $1.50 poll tax.
>
> As Professor Davis has put it: ' The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.' (Internal cites omitted.)

XIII. ASARCO DID NOT OVERRULE HOOHULI. HAWLEY DID ALLOW TAXPAYERS TO CHALLENGE BELOW MARKET RENTS.

OHA, STATE/DHHL AND UNITED STATES' briefs all cite Justice Kennedy's opinion in *Asarco Inc. v. Kadish*, 490 U.S. 605, 612-617 (1989), as if it were the opinion of the Supreme Court. The STATE/DHHL brief at 11and 12 asserts that *Asarco* effectively overrules *Hoohuli v. Ariyoshi,* 741 F.2d 1169 (9th Cir. 1984).

As this Court noted in *Cammack v. Waihee*, 932 F.2d 765, 770 fn.9 (9th Cir. 1991), in that "portion of the opinion, which was otherwise written for an unanimous eight-justice Court, Justice Kennedy was able to garner

only four votes; the other four justices expressly disavowed Justice Kennedy's discussion of the injury aspect of state taxpayer standing." *Cammack* characterized Justice Kennedy's views as taking "a dimmer view of the breadth of state taxpayer standing than this court" and adhered to its own decision in *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), which is "the leading case" and "controlling Circuit precedent" on state taxpayer standing. *Cammack*, 932 F.2d at 770 and fn. 9.

Hoohuli upheld state taxpayer standing to challenge "disbursement of funds to a particular class of native inhabitants" through OHA. *Doe v. Madison School District No. 321*, 177 F.3d 789, 794 (9th Cir. en banc 1999). As the District Court here noted several times in the Order dated May 8, 2002, (ER 5 at pages 14 and 16) *Hoohuli* involved allegations nearly identical to those in this case.

In *Asarco* taxpayers filed suit in the Arizona court challenging Arizona's leasing of minerals and school trust lands without complying with the bidding and appraisal requirements of the state's enabling act. The plaintiffs were three individual taxpayers, Frank and Lorain Kadish and Marion L. Pickens, and the Arizona Education Association, a non-profit corporation.

The trial court entered summary judgment for Defendants. Plaintiffs appealed. The Arizona Supreme Court reversed and remanded. The intervening Defendants sought and were granted certiorari. The U.S. Supreme Court held that the Arizona statute governing mineral leases of state lands was void and affirmed the judgment of the Arizona Supreme Court.

Four of the Justices expressed the view that the suit would have been dismissed at the outset if federal standing-to-sue rules applied (reasoning that state taxpayer suits should be barred by the same rules as federal taxpayer suits). Four other justices disagreed with that view. The ninth justice, Justice O'Connor, took no part in the consideration or decision. The result of the Supreme Court's decision was to uphold the judgment in favor of the plaintiffs, a teachers association and three Arizona taxpayers, whose only complained-of injury was the leasing of mineral deposits in school trust lands at below-fair-market rentals in violation of the Arizona enabling act.

If the Supreme Court in *Asarco* had restricted state taxpayers to challenging only direct expenditures of tax dollars (as the trial court here ordered), it would have either reversed the Arizona Supreme Court (because the below-market mineral lease did not involve "a dime of direct state taxpayer monies") or it would have dismissed the petition for certiorari for

lack of Article III jurisdiction (because the taxpayers did not allege any direct injury caused by expenditure of taxpayer funds).

The result of *Asarco* is consistent with trust beneficiary standing as well. If state taxpayers can challenge the leasing of school trust lands at below-market rents which result in unnecessarily higher taxes, surely public land trust beneficiaries, who suffer an even more direct impact because they are excluded completely from 200,000 acres of the federally created trust corpus and from any cash distribution of income from the remaining trust corpus, can have their challenge heard in federal court.

The United States' brief at 27 asserts that the 6th Circuit's decision in *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) rejected taxpayer standing to challenge the airport's activities. Actually the court in *Hawley* found that taxpayers *had* standing to challenge the lease of space at the airport at below-market rents.

> Appellants also advance a second economic basis for standing which requires ***741** closer analysis. They assert that the City's rental of space to the diocese for what they contend is substantially less than market value will result in loss of revenue to the City's general fund through a reduction in the size of incentive payments. If true, this allegation could give appellants standing as municipal taxpayers to defend the public treasury. As we noted above, the record does not contain sufficient facts to enable us to determine whether the rental harms the public purse, or whether it actually helps it by resulting in the rental of property which otherwise could not be rented at all. Because this is a question of fact, it must be resolved in the first instance by the trial court.

> It thus appears that a question of material fact exists as to whether the rental of the space for the chapel to the diocese at the agreed-upon price could harm Cleveland' s fisc.
>
> Because we find that appellants have standing, it is not necessary for us to consider their argument that the Cleveland City Charter' s authorization of taxpayer suits to enjoin illegal contracts offers an independent basis for standing.
>
> The judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

XIV. THE NEED FOR DECLARATORY AND INJUNCTIVE RELIEF BINDING ON THE FEDERAL DEFENDANT.

The United States argues at pages 30 and 31 of its brief that a judgment against the United States would not redress any pocketbook injury that might be experienced by Plaintiffs as taxpayers. That might be true if this suit were only against the United States. But this suit is against the other defendants, who are injuring Plaintiffs under federal laws requiring and authorizing them to do so, *and* against the United States who initiated and whose laws still authorize and require the unconstitutional behavior. The declaratory and injunctive relief Plaintiffs seek against the other Defendants and the United States will certainly redress Plaintiffs' injuries and restore equality under the law and Aloha for all to Hawaii. Without the United States, that redress will not be complete. Here are the reasons:

In the absence of the U.S., the Court cannot enjoin State officials from carrying out the HHCA or the OHA laws without exposing them to a risk of suit by the U.S. for breach of the 1959 compact to adopt the Hawaiian Homes Commission Act ("HHCA"). This could be particularly adverse for the 7,350 or more existing homesteaders because, without the U.S. in the case and bound by the Court' s judgment, the U.S. would still hold the sword over the heads of State officials. This would discourage and probably prevent State officials, if Plaintiffs prevail, from allowing homesteaders to acquire the fee simple ownership of their lots. (See Complaint, ¶3, Equitable accomodation, and prayer, ¶B and fn 1 page 35, asking the court to allow STATE/DHHL to permit homesteaders to acquire ownership of their lots.) It is unlikely that a State official would sign the deed knowing he or she might be sued personally by the United States. The absence of the United States as a party would also be an obstacle to this Court' s ability to fashion any other equitable accommodation to avoid harsh consequences to the homesteaders. Since the United States has reserved what amounts to a restrictive covenant on the 200,000 acres set aside for the HHCA, the title to that real property might remain encumbered even after a favorable decision for the Plaintiffs. Thus, the burdens imposed on the Plaintiffs, the existing Hawaiian homesteaders and the citizens of Hawaii by dismissing the claims

for declaratory and injunctive relief against the United States, would be significant.

Invalidating HHCA and §§4 and 5(f) (to the limited extent noted) of the Admission Act and the other HHCA laws and OHA laws and enjoining their future implementation, would not work any intolerable burden, or any burden at all, on governmental functioning of the United States. Indeed, it would actually take a load off the Nation' s shoulders and accomplish the result recommended by two presidents of the United States: President Ronald Reagan in 1986 and President George H.W. Bush in 1992, expressing concern that the HHCA employs an express racial classification and urging Congress to amend Section 4 of the Admission Act so that the consent of the United States is not required and also to give further consideration to the justification for the troubling racial classification. (FER I-E, I-F, I-G, I-H and I-I, filed March 4, 2002. Docket 4.)

XV. OTHER ISSUES PRESENTED BY ARAKAKI FOR REVIEW.

Time and space limits do not permit detailed reply to every argument presented by the five answering briefs of Appellees. ARAKAKI does submit these few sentences as to three of the other issues presented for review:

If this Court reverses and on remand, ARAKAKI is allowed to

challenge the diversions of public lands and revenues for the benefit of "native Hawaiians", the dismissal of **the three Hawaiian plaintiffs,** who are denied the benefit of those diversions to DHHL and OHA solely because they are not of the favored "native Hawaiian" ancestry, should be reinstated. As to the **taxation of costs**, if this Court reverses and remands, so that Appellees are not the prevailing parties, it would follow that the taxation of costs should also be reversed and reimbursement made to Plaintiffs. (The trial court abused its discretion by not considering the chilling effect on the vigorous enforcement of the civil rights laws.) It would also follow that, in the event of remand, the **discovery** order should be reversed to allow further discovery reasonably required.

XVI. CONCLUSION.

For the above reasons and for the reasons stated in Appellants' Opening Brief, the judgments of the district court dismissing Plaintiffs' claims on "political question" grounds, dismissing Plaintiffs' claims as trust beneficiaries, restricting Plaintiffs' claims as state taxpayers, striking Plaintiffs' counter motion for partial summary judgment, denying discovery and awarding costs against Plaintiffs should be reversed. The district court should be directed to adjudicate Plaintiffs' Equal Protection claims under the strict scrutiny standard

before another judge. Defendants should be ordered to reimburse their costs paid by Plaintiffs. Appellants should be awarded their costs, reasonable attorneys fees and such other relief as the Court deems just.

DATED: Honolulu, Hawaii, August 17, 2004.

Respectfully submitted,

_____

H. WILLIAM BURGESS
Attorney for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply brief exceeds the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains approximately 15,300 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). On August 10, as attorney for Appellants, I moved for enlargement of size, to 24,000 words, for this brief, pursuant to Circuit Rule 28-4, because it must reply to five answering briefs containing an aggregate of 55,000 words filed by Appellees. The motion was received by the Court Clerk on August 12, 2004. The Court has not yet ruled on the motion. This reply brief is due August 17, 2004. I respectfully request that this reply brief be accepted for filing.

DATED: Honolulu, Hawaii, August 17, 2004.

_____

H. WILLIAM BURGESS
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, two copies of the foregoing Appellants Opening Brief were served upon the following parties via U.S. Mail or certified U.S. Mail, postage prepaid.

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DATED: Honolulu, Hawaii this 17th day of August, 2004.

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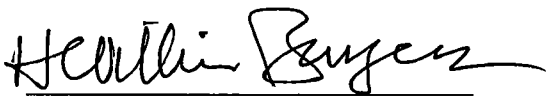
before another judge. Defendants should be ordered to reimburse their costs paid by Plaintiffs. Appellants should be awarded their costs, reasonable attorneys fees and such other relief as the Court deems just.

DATED: Honolulu, Hawaii, August 17, 2004.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply brief exceeds the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains approximately 15,300 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). On August 10, as attorney for Appellants, I moved for enlargement of size, to 24,000 words, for this brief, pursuant to Circuit Rule 28-4, because it must reply to five answering briefs containing an aggregate of 55,000 words filed by Appellees. The motion was received by the Court Clerk on August 12, 2004. The Court has not yet ruled on the motion. This reply brief is due August 17, 2004. I respectfully request that this reply brief be accepted for filing.

DATED: Honolulu, Hawaii, August 17, 2004.

H. WILLIAM BURGESS
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, two copies of the foregoing Appellants Opening Brief were served upon the following parties via U.S. Mail or certified U.S. Mail, postage prepaid.

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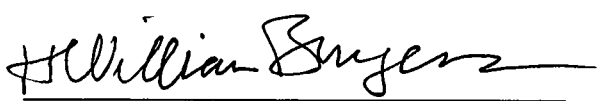

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ADDENDUM

TO APPELLANTS' REPLY TO ANSWERING BRIEFS

1. Debates in Committee of the Whole on Hawaiian Homes Commission Act, June 7, 1950.

2. House of Representatives Committee on Public Lands hearing on Statehood for Hawaii, March 19, 1947.

Debates in Committee of the Whole on

HAWAIIAN HOMES COMMISSION ACT

(Article XI)

Chairman: W. HAROLD LOPER

JUNE 7, 1950 • Morning Session

CHAIRMAN: Committee of the Whole will come to order for consideration of Committee Proposal 6 and Standing Committee Report No. 33. I recognize the chairman of the committee, Delegate Hayes.

HAYES: I hope you have your report with you this morning, Standing Committee Report No. 33 on your desk and Proposal No. 6. Your committee considered a number of proposals, 51, 52, and 156, and also Resolutions 19, 21 and Petitions 4, 8, 9, 10, 11, 12, 13, 20, 21. We also received many miscellaneous communications from individuals and organizations, a number of them opposed to the inclusion of the Hawaiian Homes into the Constitution and a large number for the inclusion of the Hawaiian Homes into the Constitution.

[Reads from Standing Committee Report No. 33]

After careful consideration of all the above proposals, resolutions, petitions and communications, your committee makes the following recommendations:

1. That the committee favors the privisions of Proposal No. 52, with certain amendments and submits herewith a committee proposal for introduction on the subject matter contained in said proposal. The committee recommends that Proposal No. 52 be placed on file.
2. That Proposal No. 156 be placed on file.
3. That Resolution No. 19 and Resolution No. 21 be placed on file.
4. That Petition No. 10 and Petition No. 11 be placed on file.

Your committee -- I've already repeated, I believe on Number 4, 8, 9, 12, and so forth. Second page.

Your committee has held eight meetings on the matters within its jurisdiction. It has had the active assistance of Miss Rhoda Lewis, deputy attorney general, Mr. Dan Ainoa, executive secretary of the Hawaiian Homes Commission, and Mr. Victor Houston, chairman of the Hawaiian Homes Commission. In addition, your committee held public hearings on the proposals and resolutions before it at Keaukaha on May 11th, Honokaa on May 12th, Waimea on May 12th, Hoolehua on May 13th, and Honolulu on May 18th. Your committee believes that it has gone into the question before it thoroughly and with full opportunity for all interested persons to be heard. The public hearings were all well attended and the committee has had the benefit of the views of almost every person in the Territory of Hawaii who is informed on the subject of the Hawaiian Homes project.

The Hawaiian Homes Commission Act, 1920, as amended, is presently part of the basic law of the Territory of Hawaii on the same basis as the Hawaiian Organic Act. It is an act of Congress and can only be amended or repealed by Congress. If Hawaii were to remain a territory, the Hawaiian Homes Commission Act would remain in force. If Hawaii were to become a state without any mention being made of the Hawaiian Homes Commission Act or the Hawaiian Homes lands in the State Constitution, or in any enabling act passed by Congress, there would be an extremely ambiguous legal situation leading to endless confusion. We could no more adopt a Constitution from which all reference to the Hawaiian Homes Commission Act was excluded, than we could adopt a Constitution from which all reference to the public debt of the Territory of Hawaii was excluded. During some 30 years of operations under this act, very extensive rights, duties, privileges, immunities, powers and disabilities have arisen by way of leases, loans, contracts and various other legal relationships.

According to the records of the Hawaiian Homes Commission, as of December 31, 1949 there were 1,337 lessees of Hawaiian Home lands, with leases covering 8,064 acres and a total population on such lands of 6,517 people. 5,480 acres of these lands were planted in pineapples under contract to several corporations, domestic and foreign. In addition, 103,150 acres were under lease through the Commissioner of Public Lands to private individuals. The Hawaiian Homes Commission had out on loans to lessees the sum of $1,000,199.74 as of December 31, 1949. Recalling of land from the Commissioner of Public Lands, subdivision and developing of lands construction of improvements, and promotion of private enterprises by lessees are all activities presently engaged in by the Hawaiian Homes Commission which are in various phases of completion and promotion.

It is therefore nonsense to propose, as some of the petitions referred to this committee have proposed, that this Convention exclude from the proposed State Constitution all reference to the Hawaiian Homes Commission Act, 1920, as amended. Something must be said and done about the Hawaiian Homes program in the transition from a territory to a state.

In recognition of this problem, the Hawaii Statehood Commission recommended, and H.R. 49, now pending in the United States Senate, now contains a provision that any convention formed under the provisions of H.R. 49 to draft a State Constitution shall provide in said constitution.

And the next paragraph relates to the section that is in [H.R.] 49, and I don't believe I shall read that section unless the members of this Convention wish that I should read it. We turn to page 4 -- 5.

H.R. 49 passed the United States House of Representatives with the quoted language included. According to recent news reports from Washington D.C., the Senate Committee on Interior and Insular Affairs has already considered amendments to H.R. 49 and has made certain amendments, none of which change or affect the quoted language. There is every reason to believe, therefore, that H.R. 49 as finally enacted will contain this requirement. If for any reason H.R. 49 should fail to be enacted into law, we have before us nevertheless the clear intent of Congress that any constitution for the proposed State of Hawaii shall provide for the continuation of the Hawaiian Homes program, and even the exact language which would be acceptable to the Congress in accomplishing this purpose.

Proposal No. 52 is a recognition of this anticipated mandate by the Congress. As introduced, it comprised three sections. The first section adopts the Hawaiian Homes Commission Act, 1920, as amended as a law of the State and the language of H.R. 49 with such paraphrases as were necessary to fit it into a state constitution and to provide for the contingency that this language of H.R. 49 might be amended in some detail. The second section accepted the compact with the United States as a compact or as a trust and agreed to carry out the spirit of the Hawaiian Homes project. The third section prohibited any legislation conflicting with the provisions or purposes of the first two sections.

Your committee amended the first two sections of the proposal in certain technical aspects without changing their basic purpose and deleted the third section as unnecessary. The amended form of Proposal No. 52 submitted herewith will comply with any requirement of the Congress as presently discernible and will accomplish the purposes desired under H.R. 49 as that bill now reads.

Proposal No. 156 seeks to accomplish the same purpose by way of an ordinance instead of by way of incorporation directly into the State Constitution as a part thereof. Your committee considered this alternative approach carefully and decided to adopt the method of Proposal No. 52 instead.

Your committee's task, therefore, has been clear-cut from the beginning. It has not even been a legitimate matter for debate whether the Hawaiian Homes Commission Act should be continued in force. Congress required that this be done as a condition of achieving statehood, and has supplied the outline of the language it will accept in the accomplishment of this requirement.

Nevertheless, in view of the offering of Resolutions Nos. 19 and 21 asking the Congress to permit the liquidation of the Hawaiian Homes program, and of the receipt of several petitions obviously intending the same results if somewhat inartistically worded, your committee did go into the history, purpose and philosophy of the Hawaiian Homes project in order to determine the desirability of its continuance on the remote possibility that Congress might accept a State Constitution which provided for the termination of the Hawaiian Homes project.

The Hawaiian Homes program was conceived in Hawaii and officially proposed to the United States Congress by Senate Concurrent Resolution No. 2 of the regular session, 1919, Tenth Legislature, Territory of Hawaii. The resolution petitioned the Congress "to make such amendments to the Organic Act of the Territory of Hawaii, or by other provisions deemed proper in the premises, that from time to time there may be set aside suitable portions of the public lands of the Territory of Hawaii by allotments to or for associations, settlements or individuals of Hawaiian blood in whole or in part, the fee simple title of such lands to remain in the government, but the use thereof to be available under such restrictions as to improvement, size of lot, occupation and otherwise as may be provided for said purposes by a commission duly authorized, or otherwise given preference rights in such homestead leases for the purposes hereof as may be deemed just and suitable by the Congress."

Senator John H. Wise of Hawaii was the principal spokesman and advocate for this program. With him were many other leaders of the community including Prince Kuhio, Delegate to Congress. Their purpose in promoting this program was to rehabilitate the Hawaiian people by encouraging them to go back to the tilling of the soil. The evil sought to be corrected was the departure of the Hawaiian people from the soil and the consequent weakening of their structure of society under the impact of Western civilization. One of the basic causes of this evil was the complete change in the systems of land tenure whereby the Hawaiians were granted fee titles to land which they promptly alienated to a large extent through a lack of knowledge and understanding of the new land laws. An additional cause was the fact that the people did not actually receive one-third of the domain which was supposed to have been set aside for them at the time of the Mahele, so that many persons had no land of their own at all when the change from feudal land tenure to common law land tenure was made.

As a consequence of the agitation for this program, the Congress finally enacted the Hawaiian Homes Commission Act in 1920. The original act provided for an experimental period of five years on certain lands on Molokai.

I'd like you all to pay attention to this paragraph because I believe it will clarify some of the criticisms that have been made.

No further lands were to be colonized unless the Congress and the Secretary of the Interior of the United States were satisfied that the first project was a success. This first project was pronounced a success and the program approved for continued operation. The Hawaiian Homes Commission and the Hawaiian Homes program have been part of the life of Hawaii ever since.

Until very recently, there has never been any suggestion that the Hawaiian Homes program should be discontinued. Then the use of certain Hawaiian Homes lands at Waimea, Hawaii came up for discussion, and in the ensuing argument, some few persons brought into the question the very existence of the Hawaiian Homes Commission Act of 1920. The arguments raised against the act have been as follows: 1. It is unconstitutional. 2. It is discriminatory. 3. The Hawaiian Homes program is a failure. 4. It is time to liquidate the Hawaiian Homes program. 5. A majority of the people of Hawaii are opposed to this act.

The question of the constitutionality of the act was considered at the time of its original introduction. The attorney general of Hawaii, the solicitor of the Department of Interior, and the Congress were satisfied that the act is constitutional. These opinions are as valid today as they were then.

The act is not discriminatory. It is a very progressive piece of legislation designed to aid an aboriginal people to survive the sudden impact of the new and highly complex civilization on their lives. It was passed to meet a very real problem and the fact that this problem is not apparent today is the best evidence that the act is succeeding in its purpose. In some of the Polynesian areas, western government that took control enacted laws that no land could be alienated, as a measure of protecting the native people. In Hawaii, the effect of the Hawaiian Homes Commission Act is to preserve only a very small part (approximately one per cent) of the domain for the Hawaiians, and to permit the ready transfer of other lands. It would be more discriminatory to repeal the act.

Those who claim that the Hawaiian Homes program is a failure are uninformed. The growth of the program from its inception to the present day is a matter of public record and is a sufficient answer to this claim.

So long as there are eligible applicants endeavoring to obtain Hawaiian Homes land, there is every reason for continuing the program. When no lands are left and when no applicants remain unsatisfied, then it will be time to raise the question of whether the Hawaiians have been fully rehabilitated.

The hearings, petitions and communications before this committee have demonstrated beyond any doubt that a majority of the people of Hawaii favor the inclusion

of the Hawaiian Homes Commission Act, 1920, in the proposed State Constitution.

Then you have your copy and it gives you the names of those who supported the inclusion of the Hawaiian Homes and I've been asked to read them: Council of Hawaiian Civic Clubs on Oahu; West Maui Hawaiian Civic Club; Hawaiian Civic Club, Hawaii; Ewa Hawaiian Civic Club; Nanaikapono Hawaiian Civic Club; Hawaiian Civic Club, Hilo, Hawaii; Republican Party Platform; Republican Precinct Club, 13th Precinct, 5th District; Republican Precinct Club, 13th Precinct, 4th District; We the Women of Hawaii; Women's Division, Oahu County Committee Democratic Party of Hawaii; Imua; Honolulu Advertiser; Honolulu Star Bulletin; Maui News; Hilo Tribune Herald; Native Sons; International Longshoremen's and Warehousemen's Union; Daughters and Sons of Hawaiian Warriors; Honolulu Chamber of Commerce; Molokai Community Association; Molokai Homesteaders Association; Nanaikapono Homesteaders Assocation; Halau O Keliiahonui; Hale O Na Alii O Hawaii, Helu 6, Kamuela, Hawaii; Council of Hawaiian Homesteaders; Waimanalo Homesteaders Community Club; Keaukaha Community Association; Kuliouou Lions Club.

Proposal No. 52

and that is [Committee] Proposal No. 6 now

as amended by your committee and as contained in the committee proposal attached preserves the present situation, complies with the apparent will of Congress, and continues the recognition by the people of Hawaii of the justice of the original enactment of the Hawaiian Homes Commission Act, 1920.

Signed by all of the committee.

Shall we go into the proposal? I would like to - -

MIZUHA: I move for the adoption of the committee report.

COCKETT: I second that motion.

CHAIRMAN: It has been moved and seconded that we adopt the report of the committee.

ASHFORD: I would like to ask a few questions of the committee chairman or, if she chooses, some other member of the committee. Is it the attitude of the committee that in the event the Hawaiian Homes Commission Act were not written into the Constitution that it would therefore be repealed?

HAYES: Will you be kind enough to repeat your question, please?

ASHFORD: Is it your position that if this act were not written into the Constitution, the result of it would be its repeal?

HAYES: Mr. Trask.

A. TRASK: The question goes beyond the scope of the committee's job. However personally we may feel about it, we are mandated by Congress under H.R. 49 to write into this Constitution a compact with the United States with the people of Hawaii. And however we may feel individually about the situation, I think the inquiry is immaterial.

ASHFORD: May I call the attention of the gentleman to the fact that that matter was discussed by the chairman of the committee right here when she was reading the report.

A. TRASK: What section is the lady delegate referring to? Of the report?

ASHFORD: Here. "If Hawaii were to become a state without any mention being made of the Hawaiian Homes Commission Act or the Hawaiian Homes land in the State Constitution - - "

A. TRASK: What page is that, please? Of the report.

ASHFORD: Three.

A. TRASK: Three?

ASHFORD: I listened to the report of the chairman, Mr. Chairman.

CHAIRMAN: Delegate Ashford, page three, what paragraph?

ASHFORD: Well, the second long paragraph.

CHAIRMAN: The portion referred to is almost exactly in the center of the page.

A. TRASK: Well, however the committee's thinking may be, is the lady delegate suggesting that we can defy the Congress in not putting in this compact? The committee - - Let me say to the delegate, as I said before when the committee chairlady suggested the public hearings on the other islands, my position was that, what purpose could be subserved by having such hearings which would go into the very question that the lady asks? We are mandated to do a simple legal job and that is to file in legal language a proposal whereby the people of Hawaii - - of the State of Hawaii would enter in a compact with the United States Congress. That is the job. However, the committee has gone beyond that and to put before the Convention and seek to answer many questions in the minds of many delegates here, who were not completely acquainted with all the ramifications of this act.

ASHFORD: Then I assume that the committee does not choose to answer that question.

SILVA: I just beg to differ with the chairman. I'm for the embodying of this part in the Constitution, but I don't think we are mandated by the act because the act hasn't even passed the Senate and the Congress of the United States as yet. They may even delete it up there. I don't know. I don't think we are mandated.

A. TRASK: Well, maybe that's an inartistic word just then, but we are aware that as late as May 22, about - - a little more than two weeks ago, the last amendments that were included did not at all seek to delete from the section the compact that was necessary to be written in.

DELEGATE: Mr. Chairman.

CHAIRMAN: Delegate Ashford still has the floor.

ASHFORD: On that matter, may I call the attention of the delegates to the fact that in the amendments proposed by the committee, the Senate Committee on Insular Affairs, that provision was made that in the event the Constitution adopted by this body did not contain all the requirements of H.R. 49 as the same may pass, if it does pass, that we could then be reconvened to deal with that matter. That's just because - - I say that because the question has arisen.

I have some other questions I'd like to ask. Was the reason that this proposal reported by the committee is divided into two sections in the Constitution rather than composed in one compact a desire to prevent its submission as a separate ordinance to the vote of the people? Was that the reason it was written into the - - proposed to be written into the Constitution?

CHAIRMAN: Do you understand the question?

A. TRASK: The proposal is divided really into two sections. There was sought to have in addition to Proposal 6, which was divided into two sections—and at this time I think that for convenience they be numbered one and two, Committee Proposal No. 6. There was suggested a ordinance to be written by the Committee on Ordinances and Continuity of Laws, as the lady delegate recognizes. That matter was left after discussion as a legislative matter.

The first section was drafted by the attorney general's department to fully conform with the purposes of the act and Section 2 was to conform strictly with the sense of a compact, which is a common draft included in, I think, about 11 other states in their constitutions with respect to the Indian lands, and a compact with the Congress of the United States.

ASHFORD: May I call the attention of the gentleman to the fact that in the present status of H.R. 49, the compact itself requires the adoption of the Hawaiian Homes Commission Act, 1920, as a law and that is separated from the compact by the provisions of this proposal.

I have another question, Mr. Chairman. What does the last sentence mean? Does that mean that the legislature shall not have control over the budget of the Hawaiian Homes Commission? Does that mean that the Hawaiian Homes Commission staff can be expanded to the -- without the instructions of the legislature to an extent of any other department of the State? And what does it mean when it refers to "other departments of the State"? What other departments of the State?

A. TRASK: The lady delegate is referring to apparently Section 1 of Committee Proposal No. 6, the last sentence thereof which reads as follows: "Such appropriations for administration expenses of the Hawaiian Homes Commission shall never be less than, after due consideration of the receipts applicable to such expenses from the Hawaiian Homes Commission lands, will accord said commission equal treatment with other departments of the State in the funds available for its administration expenses." Unquote. That's a good question.

The other lady delegate from the fourth district also asked the question. The purpose of this—and the committee—the attorney general's department has gone over and widely into the matter, the fiscal policies of the Territory and so forth—the question is with equal treatment with other departments. The fear is real and it's tangible, and certainly the delegate is well aware of that and certainly my colleagues are aware of that, that there has been no other department that has come under such scrutiny for having this act destroyed than the Hawaiian Homes Commission Act. There is no agitation to destroy the school department at this time. There is no agitation to destroy the land department at this time. There's certainly no agitation to destroy the records department or the treasurer's office or any other functionary department of the territorial government. But recently there is -- persistently there is of recent date an effort to destroy the Hawaiian Homes Commission Act. So faced with that real and tangible situation, the committee, with its various aids, have considered the various avenues of attack by agile people who are concerned over this destruction of the Hawaiian Homes Commission Act. And one of the most tangible ways in which the act could be destroyed would be for the legislature to pass an appropriation for the Hawaiian Homes Commission Act which would be merely nominal, namely $100 or $10.00 or $1.00. In that case, you could destroy effectively whatever may be necessary in funds to be received from the legislature, as has been done for the past 30 years.

So in other words, to obviate any clever, shrewd move to destroy the Hawaiian Homes Commission Act, this tangible, this loose, flexible language was used. In other words, should there be an effort passed by the legislature to appropriate just $100, whereas the previous years may show an appropriation of 50 -- $100,000, properly, third parties concerned would come into court with the proper remedy and action and seek to demand from the legislature, or any other appropriate means, equality of treatment consistent with the circumstances then existent and at least consistent with past appropriations for its administration funds, where we could show that the need was as great.

In other words, all we are concerned about is within the realm of reason. There should be a sense of equal treatment.

ASHFORD: Well, is that limited to the realm of reason? Is that not so wide that the Hawaiian Homes Commission without consultation with the legislature could immensely multiply its staff and come in and the legislature, without inquiring into the budget or anything else, be obliged to appropriate the sums called for?

HAYES: From my own knowledge, the provision of the Hawaiian Homes office is that, I believe, the receipts from all lands come up to about between $135,000 and $140,000 biennium. Isn't that correct, Charlie? And if and when we needed any more money we went to the legislature and asked the legislature to appropriate extra funds to meet with our other expenses—that is very important—which the legislature has from time to time been very agreeable. We have always been able to -- We have to present our budget to the budget bureau anyway like other department heads and we just wanted to carry out that same protection.

HEEN: Mr. Chairman.

CHAIRMAN: Delegate Ashford has the floor. You yield?

HEEN: Yield just for one question. Just wondering whether or not failure on the part of the legislature to appropriate the necessary funds for the administration expenses of the commission, that the legislature would be subject to mandamus?

CHAIRMAN: Any member of the committee wish to attempt an answer?

ANTHONY: As a matter of law, that couldn't possibly be done. You can't mandamus the legislature and that's why I think the proponents of the bill are pushing the thing too far. A good many of us are in favor of preserving what would otherwise be characterized as a clear discrimination. It's part of our history and I think a good many of us accept it. We certainly don't want to have a provision whereby we are going to treat this department of government differently from other departments of government.

SHIMAMURA: May I be permitted to attempt to clarify a point raised by one of the previous speakers. The speaker inquired as to whether or not the provisions of H.R. 49 as to the provisions for the Hawaiian Homes Commission was mandatory. I don't think there is any question that it is mandatory. In the original bill, H.R. 49, it was imparted in Section 3; in the amended form before the Senate Committee on Interior and Insular Affairs, it is amended and provided in Section 2. And the pertinent portion reads: "And said Convention shall provide in said Constitution... sixth, that, as a compact with the United States relating to the management and disposition of the Hawaiian Home lands, the Hawaiian Homes Commission Act, 1920 as amended, is adopted as a law of this State," and so forth.

C. RICE: I move the committee stand in recess, subject to the call of the Chair.

SMITH: Second the motion.

CHAIRMAN: Moved and seconded that we recess, subject to the call of the Chair. All those in favor say "aye." Opposed. Carried.

(RECESS)

ASHFORD: I thought I yielded for one other speaker, but apparently there are a lot of others. I don't wish to assume too much of this, but I would like to ask some other questions.

KING: I don't know whether the question that the delegate from Molokai had in mind is pertinent to this particular point, but I did want to offer at this time an amendment to the motion to approve the committee report, which I am informed automatically approves Committee Proposal No. 6. Amend that motion to adopt the committee report and committee proposal with the deletion of the last sentence of the first section of the proposal. In other words, cutting out the language, "Such appropriations for administration expenses of the Hawaiian Homes Commission shall never be less than, after due consideration of the receipts applicable to such expenses from the Hawaiian Homes lands, will accord said commission equal treatment with other departments of the State in the funds available for its administration expenses."

Before I ask for a second to the motion that - -

YAMAMOTO: Mr. Chairman, second the motion.

KING: That language was put in there by the attorney general's office, I presume at the request of the Hawaiian Homes Commission itself, and I feel that it has no particular value. It is an indirect order to the legislature which, as Delegate Heen has said, would have to be mandamus to—if it's possible to do so—to make them carry it out; and if they didn't carry it out, there wouldn't be anything we could do about it.

Now in the past the legislature has been very generous to the Hawaiian Homes Commission program. It has not only appropriated additional sums for administrative purposes, but considerable sums for development, and I feel that with the adoption of the program as a part of our Constitution, we can depend upon the legislature to do whatever is fair and just in the future as they have in the past. I do not feel that this particular provision destroyed the integrity of the proposal and the intent of the proposal. Now I say that as one who has been a champion of the Hawaiian Homes program for many, many years. So I would move that the motion to adopt be amended to include the deletion of that last sentence of the first section of the Committee Proposal No. 6.

HEEN: I rise to a point of information.

CHAIRMAN: Delegate Yamamoto, do you second the motion?

YAMAMOTO: Second the motion.

HEEN: I rise to a point of information. I would like to inquire from the chairman of the committee, the Hawaiian Homes Committee, as to whether or not this committee proposal has been scrutinized by Miss Rhoda Lewis of the attorney general's office, whom I regard as one of the best authorities on the Hawaiian [Homes] Commission law, as well as to the relationship of that proposal here to the provisions of H.R. 49.

HAYES: It certainly has, Mr. Heen. The attorney general had drawn this up for the committee, Rhoda Lewis. We've had her assistance at every meeting.

KAUHANE: I'd like to speak against the motion that has been put for the deletion of the last sentence in Proposal No. 6. The Committee on Hawaiian Homes Commission Act went into this question and gave it due and careful thought. The idea as expressed in the language which is now being asked to be deleted from this proposal carries with it the intent, and sincere intent, on the part of Hawaiian Homes Commission to secure sufficient appropriation from the legislature so that they can carry out its work. This sentence means that the Hawaiian Homes Commission will be treated and given the same consideration with respect to appropriations as to other branches of government and that the Hawaiian Homes Commission should not be left out on the limb, and it is to continue its work. Certainly there is great need for needed appropriations to carry out the work of the Hawaiian Homes Commission.

If it is the intent of the legislature to see that the work of the Hawaiian Homes Commission is certain, and to such an extent that they are working, their work is comparable to other branches of government receiving a high appropriation to carry out its functions, then, therefore, the Hawaiian Homes Commission should be accorded the same consideration and thought. That they also should receive the same amount of money to carry out its program.

This is only a fair request on the part of Hawaiian Homes Commission to ask that this sentence be left in the proposal. I see no reason why the members of the committee at this last instance, because of their failure to explain and to clarify the sentence so that the delegates of this Convention can amply grasp the idea of the inclusion of this sentence, now come and ask that it be excluded from its proposal. Certainly, we who sat in consideration of this proposal feel that this sentence is much needed. It's a must as far as the proposal that is to be considered by this Convention. It is a must on the part of the Hawaiian Homes Commission to ask the legislature to give them sufficient funds to carry out this work. Certainly the Hawaiian Homes Commission should not be left in the lurch, if the legislature can only see fit to grant them an appropriation less, or figuratively speaking, an appropriation of $50,000 when they need a $100,000 to carry on its work. That is the reason why this sentence was included so that in consideration of the allocation of the appropriation of funds for other comparable departments, that the Hawaiian Homes Commission should be given the same consideration and the same amount as far as funds are concerned to carry out its work; and I see no reason why the request is made to delete it. I move that that motion be tabled.

CHAIRMAN: Hearing no second - - Delegate Hayes.

HAYES: I was going to say that in our committee we have gone over this section very, very carefully and it was just felt - - they just felt perhaps maybe some legislatures wouldn't be kind enough to us and wouldn't appropriate the amount of money we would need. Mr. King in making that motion felt that we were mandating the legislature to carry out that they must appropriate this money, and many of the members here on the floor felt that it should be deleted. Personally myself, I haven't agreed on that. But, I feel that I explained it enough on the floor to say that we have gone as far as our administration's fund is concerned, that the legislature has always appropriated enough money to carry out our work with our own lease money that we receive from our land. Except once in a great while we do get in an awful jam.

Now for instance, this last legislature. What happened to us in the conference committee of the Senate? The revolving fund passed both houses and in order for us to get our revolving fund, we would have to vote for Waimea, and so we lost our revolving fund, lost the appropriation up here at Kalawahine and defeated the Waimea interests. I feel that your chairman is still worrying about whether it would be proper for me to agree to this or not.

MIZUHA: The last section under consideration, or the last sentence which is under consideration at the present time, is relative to appropriation for administration expenses. As I read the Hawaiian Homes Commission Act, which will be incorporated into the Constitution, a ceiling is placed, or a method by which the appropriation - - money should be appropriated for the Hawaiian Homes Commission is defined in that act and if the legislature does not act, the budget submitted by the Hawaiian Homes Commission will automatically be effective not in excess of $200,000. So it seems as though it is a guarantee to the Hawaiian Homes Commission that they will get up to $200,000 in the event the legislature does not act on their budget, and that is

written into the Hawaiian Homes Commission Act. And hence, it is felt that perhaps a provision like this in the Constitution will be merely surplusage or redundant or whatever you may want to term it; and hence it is not necessary, but the bare fact that we have accepted the Hawaiian Homes Commission Act as a law of the State of Hawaii. And on that basis, perhaps, it is appropriate to delete this last sentence.

TAVARES: I think a slight correction of the implications of that statement might be in order. As I understand it, H.R. 49, if passed in the last form we've heard of, would permit our legislature to amend Section 213 of the Hawaiian Homes Commission Act and change that. Now, if this article as proposed by the Committee on Hawaiian Homes Commission is adopted as a part of our Constitution, it seems to me—and that is my opinion—that one portion of it will eliminate the situation where any of the proceeds or the income from Hawaiian Home lands can be lapsed into the general fund of the Territory, and I am for that. I think the lands are trust lands and as long as we observe the trust, the income from the trust lands should stay with the trust, and that to some extent will be a guarantee that the project won't die because, in my opinion, the income from those lands is bound to increase in the future to some extent. Therefore, even if the legislature neglects the commission somewhat, there will be some mitigating circumstances in the increase of the income to the lands. I think that perhaps will clarify the situation a little bit.

Now, I would like to say very sincerely to the -- I know the very sincere delegate who has moved to table this motion although it's not been seconded. There are a great many of us who are very friendly to this Hawaiian Homes Commission project, but if that motion is seconded and it comes up, many of us who are for the act will be forced to vote against tabling. I really think a great deal more damage would be done to the project by trying to table this and I think the rest of us will unite to support the act with the sentence out which the delegate from the fifth district has moved to delete. I'm very strongly for that.

ASHFORD: Point of information, Mr. Chairman. Who moved to table what?

CHAIRMAN: Mr. President moved to -- Pardon me, Delegate Kauhane moved to table the motion to amend.

HEEN: But there was no second.

CHAIRMAN: That's correct. Delegate Mau has the floor.

MAU: I want to ask the last speaker if he felt that if this last sentence on page 1 of Proposal -- Committee Proposal No. 6 were included, that the act might be declared unconstitutional. Or what was the feeling? How would it jeopadize the act itself?

TAVARES: I was not speaking of constitutionality. I was speaking of the attitude of the members, as I believe, of some members of this Convention who like myself believe that that sentence goes a little too far. It purports to give a guarantee of treatment to one department of the government which we are not going to include for any other department of government; and on the face of it, I believe sincerely that it's an unreasonable requirement, besides being unenforceable in any practicable manner.

MAU: But no question of legality or anything is raised with reference to this last sentence? It would not endanger the act except from a matter of policy?

TAVARES: I haven't given that enough thought to say whether I think it would be invalid or not, but I do think it would be utterly unenforceable in any event. And I think it's wrong in principle to give one department of government a guarantee of treatment that you don't give in the Constitution to every other department. That is implied anyhow. I sincerely believe that after this flurry of feeling the next -- succeeding legislatures are going to be just as fair to this department as any other within their means.

MAU: I'd like to ask another question. As I got the discussion, the full amount, the biggest amount that the commission would get, even if this sentence were left in, would be something like $200,000. Am I correct in that?

TAVARES: No, I don't think that is correct. Under H.R. 49, our legislature can amend that section to change that amount to any amount it sees fit.

CHAIRMAN: Delegate Mau has the floor. Do you wish to yield to an answer here? Delegate Mizuha.

MAU: Yes, I'd like to get an answer from Delegate Mizuha.

MIZUHA: I believe H.R. 49 does not give our Territory -- the State legislature the right to change any amount that the Hawaiian Homes Commission should have as far as appropriations go. It only refers to changes in administration but not in appropriations of money.

TAVARES: I beg to correct the gentleman. The act of H.R. 49 very carefully mentions three funds, I believe, that the legislature cannot affect. It very carefully leaves out any mention of the Hawaiian Homes administration account, which is the account involved in this argument and thereby, by implication, leaves that open to amendment by our legislature.

MIZUHA: I have before me H.R. 49 which says as follows: "Provided that, 1. Sections 202, 213," which is under consideration at the present time, "and other provisions relating to administration only." It does not refer to appropriations.

CHAIRMAN: Delegate Mau, does that answer your question?

MAU: Well, this last sentence does relate to administration expenses.

TAVARES: Yes, and I think somebody ought to get that Section 213 and read it and I will demonstrate to the delegate from Kauai that I am correct in my statement, if someone will produce that last amended section of Section 213.

CHAIRMAN: Delegate Heen has asked for the floor. Delegate Heen, you asked for the floor a moment ago. Pardon me, Delegate Mau, were you through?

MAU: No, I'm not through, Mr. Chairman. While we're waiting, may I ask several other questions?

A. TRASK: Mr. Mau, if Delegate Mau will yield to a question with respect to this inquiry here --

MAU: I yield for that purpose.

A. TRASK: The latest H.R. 49, namely Committee Print, United States Senate, May 23, 1950, is in line with the expression made by Delegate Tavares, namely, that that $200,000 may be amended by the legislature either up or down. It says, in other words, that Section 213 in particular reference with respect to administration expenses, which is the matter in controversy as to the operational cost of the administration of the Hawaiian Homes Commission Act, may be amended by the local legislature and that is why the reference from the Hawaiian Homes Commission Act that an ordinance in addition to Proposal -- Committee Proposal No. 6 be adopted was not adopted, because the legislature may properly amend the act as it now stands under H.R. 49.

MAU: I just want to pose this question then to the Convention. So far as the discussion has gone, there seems to be no particular danger in permitting this last sentence to remain. Also in the discussion there is a feeling that because of the present laws which will be reenacted or remain in force, the funds of the commission would be sustained or

will remain as they are today. Now, if that be so and there's no harm in leaving this last sentence in, I certainly would favor its retention, unless it's otherwise satisfactorily explained to me that it should go out and for a valid reason.

CHAIRMAN: If you are through, Delegate Mau, I'd like to recognize Delegate Heen at this time.

MAU: I have other matters to talk about, but I - -

CHAIRMAN: We'll recognize you again. Delegate Heen.

HEEN: You will note that the language used in the last sentence is mandatory in form and it cannot serve any useful purpose because the legislature is not subject to mandamus.

ASHFORD: I demurred on the ground of uncertainty and that hasn't been answered yet. It is customary in the legislature from time to time to cut the appropriations of one department and to raise the appropriations of another department. With which department should the Hawaiian Homes Commission be linked?

CHAIRMAN: Delegate Anthony, you asked for the floor?

ANTHONY: Thank you. I think the proponents or the opponents of the present motion to delete are carrying this thing too far. In the first place, let's all recognize what we are doing here. This enactment into the Constitution of statutory material is a departure from what this Convention has tentatively accepted as a pattern of this Constitution. It is a departure which a good many of us feel is necessary by virtue of the historical setting that we find ourselves in. This particular act has become a symbol with the Hawaiian people and even though it is discriminatory, in my opinion, it is not so obnoxious that this Constitutional Convention should reject the incorporation of the act. Now when you go beyond that, go beyond what is mandated under H.R. 49 and attempt to insert language in there which must mean something—it either means something or it means nothing—I say that we are going entirely too far, and I think we ought to leave the act just where it stands. Hawaiians have never been injured under the administration of the act; they have been treated fairly and I think that the motion of the President should carry.

HAYES: Mr. Anthony - - Delegate Anthony, rather, I appreciate what you said in some of the things, and some of the things, of course you and I would never believe together. But I just want you to be very kind to us because we are taking the instructions of the attorney who has drawn this for us; and so therefore, the committee is not responsible for coming to this Convention and mandate this Convention to do this and that. Now, who do you think I'm going to look to for help and guidance except - - I mean for any proposals that come to our committee. I certainly respect those who helped us a great deal in the making of these proposals; and so, therefore, I hope you don't feel that the committee deliberately did this on their own feeling on this matter.

ANTHONY: I didn't mean to convey the impression that the committee was trying to mandate anybody. When I use the word "mandate" that is a mandate in the act of Congress. In other words, if we are going to have a Constitution pursuant to H.R. 49, we must put in a safeguard which will keep the Hawaiian Homes Commission Act as it stands unimpaired. Now I think that the proponents of that measure should accept H.R. 49 and take their chances with other departments of the government. They have a minimum guarantee with the trust fund and they have a minimum guarantee in the existing legislation, and there is no thought in anybody's mind, as I've been able to gather, to eliminate those guarantees, and the trust fund will remain unimpaired.

SILVA: I think at this time it would probably be fitting to make a request of the committee itself, that if they would withdraw that last sentence that is in controversy, that perhaps they can receive full accord of this Committee of the Whole. It would be nice if it would come from them themselves, if they would be glad to withdraw that rather than put it through a motion and have it to wrangle all over the place.

MAU: I merely want to correct an impression that was given both by the President of the Convention when he spoke last and the last speaker from the - - delegate from the fourth district when he said that the legislatures in the past have been generous with the Hawaiian Homes Commission. That might be true in the last few years, but since 1920 and up to a few years, I don't believe that the Hawaiian Homes Commission Acts have been carried out for the best interest and welfare of the Hawaiian people by the legislators themselves, because they have sent these people out, as an example, to Nanakuli without money with which to develop irrigation and domestic waters. How do they expect these people to make a fairly good living and a good homestead? I feel that there should be a guarantee that enough money will be made available to develop these lands if you expect these people to stay on their homesteads. I charge at this time that the administrations in the past years have not done their duty either in asking Congress for sufficient money to develop these lands or going before the legislature with a strong enough case and say, "Look, if this act is to be administered fairly and for the benefit and the best interests of the Hawaiian people, money must be made available for the development of these lands."

That's why I want these questions answered, to be sure that there will be certain guarantees that enough money is available for the full development of these lands. Otherwise, it's a useless gesture to say set aside some of these lands and then don't give them money to develop these lands. You can't live on these lands without having them have sufficient funds to build roads, to make water available, and to make irrigation water available so that they can make these lands fertile.

KAUHANE: I rise to a point of information. I believe the last speaker when he was first accorded the opportunity of the floor stated that he agreed that the last sentence should be left in the Constitution. If that statement is correct, then he has seconded the motion that I have made for the tabling of the motion to delete this last sentence.

MAU: Before I did that, I wanted the questions answered so that I would know how to vote on this last sentence.

HEEN: Will the last speaker yield to a question? Supposing those who are in favor of the Hawaiian Homes Commission law approached the legislature, made out a strong case that they should have $200,000 instead of $100,000 and the legislature appropriated $100,000. How are you going to force the legislature to give the other $100,000?

MAU: I'm not saying that we are going to force them either by mandamus or what else, but I want to know what guarantees have we that the commission will have sufficient money with which to operate these lands?

KAUHANE: Will the speaker yield so that I can answer Judge Heen? Mr. Speaker, Mr. Chairman?

CHAIRMAN: Delegate Mau, you have the floor. Do you yield to a question over here?

HEEN: I would like a direct answer to that question, Mr. Chairman. I still have the floor.

MAU: I thought I answered the delegate's question, and that is this. I know of no way in which you can force the legislature to make the appropriations. Then, of course, the answer is no. What is the effect of this last sentence if it remains? Does that guarantee the appropriations - - necessary appropriations?

CHAIRMAN: Do you yield, Delegate Kauhane?

MIZUHA: Mr. Chairman.

CHAIRMAN: Delegate Kauhane has the floor.

MIZUHA: Mr. Chairman.

KAUHANE: I'd like to answer the delegate from the fourth district.

DELEGATE: Mr. Chairman.

CHAIRMAN: Delegate Kauhane has the floor.

KAUHANE: I'd like to answer the question put by the delegate from the fourth district, namely, Senator Heen. Certainly, all we ask as a guarantee from the legislature is a fair consideration as to administration funds for the Hawaiian Homes Commission. If you feel that $200,000 is being requested, you can only give a hundred, but to other departments you will give them the full amount, and we ask you to be fair with the Hawaiian Homes Commission in your consideration to give them the amount in comparable to other departments.

MIZUHA: May I answer the question of the delegate of the fourth district? As the Hawaiian Homes Commission Act is now written, if the Hawaiian Homes Commission in its budget asked for anything over $200,000 and the legislature fails to act, the $200,000 appropriation is automatic under the present Hawaiian Homes Commission Act. That is why I am raising the question at this time. There is a difference between another delegate of the fourth district and myself as to what the provisions of H.R. 49 contain at the present time. It is my contention that H.R. 49 -- the provisions in H.R. 49 does not change Section 213 to give the legislature of the State of Hawaii the authority to reduce the appropriations below $200,000. He contends that it does. If it does and limits the Hawaiian Homes Commission only to the $149,000 of income they receive at the present time, and if his interpretation is correct, then I am not in favor of the deletion of the last sentence in the committee proposal at the present time.

KING: I feel that the argument revolving about the interpretation of H.R. 49 and the proposal is not essential to the point at issue. The Committee Proposal No. 6 was drafted with the assistance of the attorney general's office, Miss Rhoda Lewis, and with the assistance and recommendations of the Hawaiian Homes Commission. And it does include a provision which I do not feel is essential to the spirit of the bill. And then let H.R. 49 provisions fall where they may. If the income is less than $200,000, and it's mandatory that it shall be $200,000, let that be the answer. If it's not mandatory, let the Hawaiian Homes Commission live on the income derived from its own land.

I'd like to point out in that regard that as these old leases expire, the Hawaiian Homes land will be released at higher rent so that the income in the future will be substantially more than it has been in the past. Senator Rice interpolates here that it will be over $200,000. So without trying to cut off debate, I don't feel that we are making any progress and I would like to move the previous question on the amendment, but I will not move it because others are seeking recognition.

CHAIRMAN: Delegate Tavares asked for recognition a moment ago.

TAVARES: Unless the members of this Convention want me to read that section, I won't say any more. I think that if the section is read on the Hawaiian Homes administration account, it might clear up some questions. Does anybody want to have that read?

DELEGATES: No.

FONG: A little while ago, the delegate from the fifth district, Mr. Mau, my very good friend, stated that the legislature has been very derelict in its duty towards the Hawaiian Homes Commission. Now if I were to sit here without answering the charges made by the chairman of the Deomcratic Party, I would be giving his statements the dignity of truth. Now I want to state to Mr. Mau -- but now Mr. Mau says except in recent years the legislature had been taking very good care of the Hawaiian Homes Commission. You mean in the past two years we have been taking care of the Hawaiian Homes Commission?

MAU: Will you yield for a moment? In my original statement, I said "except in recent years." I want to call the attention to the Convention, however, that the Hawaiian Homes Commission has come to the City and County government in the last four years for money with which, first to construct a water line to feed the Hawaiian Homes Commission lands in Waimanalo. We appropriated $35,000 for that purpose. Again when they opened up Papakolea, they asked us to give them money for their roads and they are asking money to put in lights. The City and County government has nothing to do with the Hawaiian Homes Commission Act or the Hawaiian Homes Commission itself. But you can see that when they needed money, they came to the county government, instead of getting that money either from the Congress of the United States or from the legislature of the Territory of Hawaii.

FONG: I just want to answer Mr. Mau to this extent, that as far as the legislature is concerned, the legislature has been very, very lenient and reasonable with the Hawaiian Homes Commission. I want to state, within the past four years there has been a Hawaiian heading the Finance Committee of the House of Representatives, and Mr. Joseph Andrews is one of the strongest backers of the Hawaiian Homes Commission. I want to state that as far as the House of Representatives is concerned—the senators can answer for themselves—the House of Representatives has been very reasonable to the Hawaiian Homes Commission.

ANTHONY: I'd like to get Assistant Attorney General Rhoda Lewis over here, and therefore I move for a five minute recess.

DELEGATE: Mr. Chairman.

FONG: Mr. Chairman, I have the floor.

CHAIRMAN: Delegate Fong has the floor. Proceed.

FONG: I thought that Mr. Anthony was going to ask me a question.

CHAIRMAN: I thought you were, too. Pardon me.

FONG: I just want to state that sitting here as a delegate from the fifth district, I had to answer Mr. Mau's statement that the legislature has not been fair. And I think the legislature will always be fair to the Hawaiian Homes Commission. We have in the -- As far as the legislature is concerned, we have requests from various departments. Every department naturally would like to have more money. It is up to your legislature to distribute the money according to the needs and they can only distribute the amount of money that they receive and I know as far as the Hawaiian Homes Commission, the Hawaiian Homes Commission has received its proportionate share of the Territory's revenue. I think there is no reason why we can't expect as good a treatment for the Hawaiian Homes Commission as they have received in the past.

SILVA: The Senate's record speaks for itself. I don't need any political speeches, but I want to say I'd like to move this time for the previous question.

SMITH: I'll second that motion.

CHAIRMAN: We have been discussing the amendment, which has been duly seconded, to delete the last sentence of Section 1 of Committee Proposal No. 6.

DELEGATE: Roll call.

KAUHANE: Point of information. The previous question has been asked. I now raise a point which I raised previously. I believe that my colleague from the fifth district when he was accorded the floor, namely Delegate Mau, that he expressed the retention of the last sentence which - -

SILVA: I'm afraid my motion is out of order.

KAUHANE: It is not out of order. The previous question has been asked. He specifically stated that he favors the inclusion of this thing, which seconds my motion to table the motion put by Delegate King. The previous question, what is the previous question?

CHAIRMAN: The Chair rules that there was no second to that motion to table.

NIELSEN: A point of order. I think that President King's motion was that we approve the committee proposal deleting that last sentence. So I think that we had better refer to the notes on that.

CHAIRMAN: Will the Secretary refer - -

KING: As I recollect my motion, it was an amendment to the previous motion which was to adopt the committee report. I amended it to read to cut out the last sentence of Section 1; which, if the amendment were adopted, then the original motion would still be before the Convention on final action as amended.

CHAIRMAN: Shall we now put the motion to amend?

APOLIONA: May I ask for a short recess for the Hawaiian Homes Commission to get together.

CHAIRMAN: The question has been called for.

DELEGATE: Roll call.

CHAIRMAN: How many are in favor of roll call? Seven. The required ten is not indicated. All those in favor of the amendment please say "aye." Those opposed. Carried.

ASHFORD: The motion was to put the previous question, and the Chair didn't put that motion first. The motion was not - - before the house was not for the amendment. It was whether the previous question should be put.

CHAIRMAN: I stand corrected.

ROBERTS: Point of information. I'd like to know whether the chairman of the Hawaiian Homes Commission Committee favors the deletion of that sentence.

CHAIRMAN: Will the chairman answer the question?

HAYES: Delegate Roberts, I believe I stated my situation, that I was confused because of not being an attorney, in the first place. In the second place we have had faith and trust in Rhoda Lewis, who has been very kind to us, and maybe the committee should get together again with Rhoda before I could make up my mind as chairman of this committee.

LEE: In view of said confusion, I move that we recess for five minutes. I believe Mr. Anthony has called for Miss Rhoda Lewis to be here and perhaps it might resolve our differences.

CHAIRMAN: Is there a second to that?

HEEN: I second the motion for the recess.

KING: A point of information. Has the previous question been ordered?

SAKAKIHARA: The Chair would have to put the motion.

KING: The previous question was put by the Chair.

CHAIRMAN: I think I made a mistake and put the amendment, and as a matter of fact, is it not true that the previous question cannot be put in Committee of the Whole?

KING: Well, then the motion for the previous question is still pending if the Chair did not put it.

HEEN: Point of order. A motion to recess is always in order.

KING: My point of information was whether the motion to order the previous question had been put. Now, the Chair put the wrong motion. I'm asking if the motion to order the previous question is still pending. If it is pending, then the gentleman's request for a recess is in order. But I want the parliamentary situation to be clear that there is pending a motion for the previous question.

LEE: Still pending. That is part of the confusion, and it seems to me, therefore, that the motion for recess should be put. It takes precedence of all - -

SILVA: I move that motion be tabled. That is always in order too, Mr. President.

PHILLIPS: I second the motion.

SAKAKIHARA: Second.

CHAIRMAN: All those in favor of recess, please say "aye." Those opposed. The noes have it.

KING: The motion to table that motion to recess will have to be put first. I request the Chair to put first the motion to table the motion to recess.

PORTEUS: Point of order. Am I correct in assuming that the Chair put the question for a recess and that recess lost?

CHAIRMAN: That is correct.

PORTEUS: Am I not correct in assuming then that the question now before the house is to whether or not the motion to the previous question shall carry?

CHAIRMAN: That is correct.

PORTEUS: Will the Chairman please put that question to the house, please.

CHAIRMAN: The previous question - -

HEEN: I note that Miss Rhoda Lewis is here and I think it's proper and appropriate at this time that we ask her about her views upon this last sentence.

SAKAKIHARA: Point of order.

CHAIRMAN: State your point.

SAKAKIHARA: There is a motion before the Committee of the Whole, motion for previous question which was duly seconded. The Chair has failed to put the motion before the house.

CHAIRMAN: The previous question, as I understand it, is for the adoption of Committee Proposal No. 6.

NIELSEN: The question is, shall we move for the previous question? You put whether the previous question shall be moved for.

CHAIRMAN: All those in favor of the previous question please say "aye." Those opposed. It is carried.

SAKAKIHARA: Now the question is to delete the last sentence of paragraph one.

KING: If those who desire a recess would like to make such a motion now, I would have no objections. The previous question has been ordered now.

LEE: Our feelings have been hurt, but we'll move for a recess just the same.

SAKAKIHARA: I object.

HEEN: I second the motion.

CHAIRMAN: It's been moved and seconded for a recess. All those in favor say "aye." Those opposed. The ayes have it.

(RECESS)

CHAIRMAN: Will the committee please come to order.

KING: As I understand the parliamentary situation, the previous question has been ordered. I voted in favor of the previous question, and I move now to reconsider our action on the previous question. May I state that if we reconsider and cancel the previous question, the committee is about to accept the amendment I proposed as part of their report.

SMITH: Second the motion.

CHAIRMAN: It's been moved and seconded that we reconsider the motion for the previous question. All those in favor say "aye." Those opposed. Carried.

MIZUHA: Inasmuch as the committee will submit another amended report, I wish to withdraw my motion for the adoption of the committee report.

CHAIRMAN: The motion has been withdrawn.

KING: If it's necessary to clear the situation, Mr. Chairman, I withdraw the amendment I made to his motion. The only thing pending before the Convention - - the committee at this time is the committee report with no motion, and, Madam Chairman, may I request an adoption or approval of the committee proposal.

CHAIRMAN: Both the amendment and the motion for adoption have now been withdrawn.

ASHFORD: In the reports of other committees we have not proceeded primarily upon the adoption of the report; we have proceeded upon the separate sections, and I wonder if that wouldn't be a better procedure here.

SILVA: The best method is probably to move for the adoption of the first section of the proposal, of the first proposal, and then discuss that. The latter proposals, we can report progress until it's finished. I move that we approve the first section of the proposal on the Hawaiian Homes Commission Act.

DELEGATE: Deletion.

SILVA: No. No. No.

KING: Well, the committee hasn't deleted that last sentence.

SILVA: No, the first section. The first section has - - does not cover that.

KING: Yes, it does.

CHAIRMAN: Yes, the sentence in question is in the first section.

SILVA: Well, we'll take up the second section then.

CROSSLEY: I would move the adoption of the first section of the committee report with the deletion of the last sentence.

APOLIONA: I second Mr. Crossley's motion.

CHAIRMAN: We have then a motion for the adoption of the first section of Committee Proposal No. 6 with the deletion of the last sentence.

KING: May I speak briefly for the committee—the Madam Chairwoman has asked me to do it—that they approve of that deletion and accept it as an amendment to their committee report.

ASHFORD: I'd like to ask another question concerning this section. In H.R. 49, the requirement is that the compact shall—what is that language?—adopt the Hawaiian Homes Commission as a law of said State subject only to amendment, repeal, so forth. Now the compact contained in Section 2 does not contain that provision and it has been separated into Section 1. What was the purpose of that?

CHAIRMAN: Would some member of the committee answer the question? Delegate Trask.

A. TRASK: That was legal convenience as drafted by Rhoda Lewis of the attorney general's department, to have the adoption of the act in one section and the compact, as the word requires, in the next section and that is the usual form that is used in other constitutions—11 of them—with respect to these other lands. Only this had to be done with respect to what we considered were funds, financial, the fiscal arrangement. In the other constitutional provisions in the other 11 states, they did not have, as we have in Hawaii with respect to the Hawaiian Homes Commission Act, the budgetary affairs, which may be secure from the legislature, and that's why that provision was made. With reference also to the peculiar arrangement whereby in Hawaii Congress can only amend or repeal certain provisions of the act, whereas the legislature may have access to amend some other provision of the act; whereas in the compact with respect to land, and these other states with respect to Indian lands, there shall be no amendments whatsoever by the state legislature.

ASHFORD: Since the question of Indian lands has come up, I would like to address myself very briefly to that subject. The Indian lands referred to in the various constitutions of the newly created states and compacts with the United States are an entirely different basis from the Hawaiian Homes Commission lands. When we became a part of the United States, the United States had no public lands here except those specifically designated for defense and so forth. The public lands were ceded to the United States and accepted under the Newlands Resolution subject to a trust; that trust was recognized when we became an organized Territory. The lands were put under our administration by the Organic Act. They remained our lands in the control of the United States pending the time we were to be admitted as a state.

Now, the Indian lands are upon a different basis entirely. Those were lands not for specific Indians, they were lands set aside either by treaty with the Indians or by an act of Congress out of the public unappropriated lands of the United States—none of which exists in Hawaii or have ever existed in Hawaii—and always under the control of the United States under the terms of the Constitution and under their absolute title. The terms of the Constitution of the United States provide for the regulation of commerce with the Indian tribes. Those lands were set aside from the control of the state, retained in the United States, and subject to the control of the United States; therefore, there was no infringement of the sovereignty of the state. In this case, however, the trustee of our lands, in returning them to us, is attempting to attach to them terms of trust as though it were the full order. That distinguishes these lands from the lands set aside in the various new states for Indian reservations.

There is another reason for the action of the United States in that regard and one which I, for one, could never accept as applying to the Hawaiian people who had a nation of their own and ran it beautifully for some 50 years. And that is, that the Indians are a simple, ignorant and inferior people.

HAYES: I'd like to say at this minute, that, isn't it true that the reason for the Hawaiian Homes Act as a basic law is because to right a wrong that had been done to the Hawaiian people? Therefore, I would like to move the previous question.

TAVARES: I think there is an answer to the argument just made by the delegate from Molokai. I agree with the statement that ordinarily since the lands are trust lands, Congress would not be reasonable in putting a string on it when it gives it back to us. Unfortunately, we, the beneficiaries, have agreed to that change of the Hawaiian Homes Commission Act through our legislature. Not once, but many, many times. And in that respect therefore, we have the situation of the beneficiary having consented to the trustee changing the terms of the trust and I think that the argument, therefore, is not sound.

TRASK: I yield to Mr. Holroyde before any further statement with respect to the statement by the Madam Chairman.

HOLROYDE: I was just going to second her motion for the previous question.

SAKAKIHARA: Point of order. I think the previous question is out of order in Committee of the Whole. I think you pointed out to me this morning under *Cushing*. Both *Roberts* and *Cushing*.

WOOLAWAY: Point of order. I think that under the rules of the Convention, it is in order.

SAKAKIHARA: But this is not a Convention; this is Committee of the Whole.

CHAIRMAN: May the Chair say that having learned some of the rules of putting the previous question, there is still a difference of opinion among the delegates as to whether it's appropriate in the Committee of the Whole.

MAU: I wonder if the committee will consider adding to the list of organizations in support of inclusion of this act, the Democratic Party of Hawaii. Now please don't ask me whether it's the "stand fast" group or the "walk out" group. But two years ago a motion was made before the Central Committee of the Democratic Party, asking that this act be incorporated in the Constitution when it be drafted. I would ask that the report be amended to include the Democratic Party of Hawaii. Is the - - Will the committee agree to that, rather than my making a formal motion?

TAVARES: Point of order. My understanding is that a committee report cannot be amended in this manner.

CHAIRMAN: Does that answer your question, Delegate Mau?

MAU: Well, I understand that there is a motion to adopt the committee report.

A. TRASK: Without identifying myself with any particular group of the Democratic Party, the motion is to the adoption of Section 1 of Proposal No. 6.

CHAIRMAN: That is correct. The other motion may have included the committee report, but this has not.

MAU: If you'll look at the records, the original motion was made to adopt the committee report.

CHAIRMAN: That's correct, but it was withdrawn.

MAU: Oh, it was withdrawn.

CHAIRMAN: Yes, sir.

SAKAKIHARA: The reason I ask - -

MAU: Mr. Chairman.

CHAIRMAN: Delegate Sakakihara has the floor.

MAU: Mr. Chairman, I haven't yielded yet.

CHAIRMAN: Pardon me. Delegate Mau.

MAU: I'd like to ask the committee whether it had before it in its deliberations any members of the land board or the Commission of Public Land to get information as to the possibilities of public lands of the territory being opened up for agriculture uses through leases to the members of the public? Was any information like that obtained by your committee?

HAYES: That's not our kuleana. The public lands - - the commissioner has that right.

MAU: I understand that, Madam Chairman, but you realize that one of the chief criticisms against incorporation of this act by the opponents is that certain lands ought to be set aside in the territory for small farms. They have a point, and I wondered whether or not the committee in protecting itself and in strengthening its case, dwelled on that subject to report to this Convention that certain commitments or suggestions have been made by the members of the board of public lands.

ASHFORD: Point of personal privilege.

CHAIRMAN: Delegate Mau, did you ask a question and waiting for an answer?

MAU: Yes.

HAYES: We have gone into that situation, Delegate Mau.

MAU: And what is the situation?

HAYES: Well, the situation will be referred back to the public lands and it's a program that we have to work out in the few years to come.

MAU: One other question. Has the Hawaiian Homes Commission itself considered this possibility? Where much of its lands may not be developed for several years, whether they would agree to make such lands available so that the income can be used by the Hawaiian Homes Commission to carry out its work. In other words, whether they have taken into consideration the possibility of making short term leases for agricultural purposes, until the time when they are ready to make use of those lands and develop them.

KING: I rise to a point of order. I dislike to raise a point of order against my colleague from the fifth district; but, nevertheless, he is not talking pertinent to the subject matter here, but the administrative jurisdiction of the Hawaiian Homes Commission and the administrative jurisdiction of the Commission of Public Land, and that subject matter is more or less under the - - that latter part is under the jurisdiction of the Committee on Agriculture, Conservation and Land, and the question they are asking is not pertinent to the subject matter or to the motion that is pending before this Convention.

MAU: I might state - -

KING: We could go along and discuss the entire program of the homesteading and settlement and FHA and everything else and delay action on this particular proposal, which is simply a proposal to adopt into the Constitution of Hawaii the substance of the Hawaiian Homes Commission Act of 1920.

MAU: May I be given an opportunity to clear what I'm trying to get at?

CHAIRMAN: Delegate Mau, you still have the floor.

MAU: If an answer is given, there is no question that the committee will strengthen its position and that's the reason for asking these questions.

ASHFORD: A point of personal privilege. The delegate from the fifth district has said the opponents of writing this law into the Constitution do so on the ground that the lands aren't available to all the people. That is not my position at all. My position is twofold. First, that it writes into our Constitution an adoption of the principle that classification by the accident of race is appropriate, which seems to me the most dangerous principle we could possibly accept here. And, second, that the lands granted by the Republic of Hawaii and accepted by the United States, being ceded in trust cannot have trust strings tied to them when they are returned.

CHAIRMAN: Delegate Mau, I, as chairman, rule that this is not germane to the motion which is for the adoption of Section 1 of Committee Proposal No. 6, with the last sentence deleted.

SAKAKIHARA: I would like to ask the delegate from Molokai a question. She has raised a twofold question here giving her reasons why she feels that this should not be written into the basic law. Does the delegate from Molokai feel that on those grounds that this proposal will be unconstitutional? In your opinion?

ASHFORD: Like another attorney I almost said, "May it please the court."

I think that the requirement by H.R. 49 of entering into a compact with the United States is absolutely invalid. This is land and this is a subject matter over which the United States, if we were a state, would have no control, and in requiring us to enter into such a compact, they diminish our sovereign powers. They, therefore, infringe upon that well settled interpretation of the provisions of the Constitution that new states shall be admitted upon equal terms with the old.

Now, I'll just read you some certain language from the Supreme Court of the United States which in its essence has been repeated often.

> When a new state is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original states, and such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new state came into the Union which would not be valid and effectual if the subject of Congressional legislation after submission. (*Coyle vs. Smith,* 221 U.S. 559)

CHAIRMAN: Does that answer your question, Delegate Sakakihara?

SAKAKIHARA: Yes, yes. I have before me, Mr. Chairman, excerpt from Report No. 839, House of Representatives, 66th Congress, Second Session, Rehabilitation of Native Hawaiians, to accompany House Resolution No. 13,500, dated April 15, 1920:

> Constitutionality. In the opinion of your committee there is no constitutional difficulty whatever involved in setting aside and developing lands of the Territory for native Hawaiians only. The privileges and immunities clause of the Constitution, and the due process and equal protection clauses of the 14th amendment thereto, are prohibitions having reference to state action only, but even without this defense the legislation is based upon a reasonable and not an arbitrary classification and is thus not unconstitutional class legislation. Further, there are numerous Congressional precedents for such legislation in previous enactments granting Indians and soldiers and sailors special privileges in obtaining and using the public lands. Your committee's opinion is further substantiated by the brief of the attorney general of Hawaii (see Hearings, pages 162-164) and the written opinion of the solicitor of the Department of Interior (see Hearings, pages 130-131.)

I raised the question because I was in a serious doubt as to whether incorporation of the Hawaiian Homes Commission Act as a compact with the federal government will be class legislation in the opinion of the Madam Delegate from Molokai.

ASHFORD: Mr. Chairman, may I further answer that statement? In the first place, the opinions of a committee or the opinions of a solicitor general or anything else are just opinions. The Supreme Court is the interpreter of the law, and I think the Supreme Court has interpreted the law.

In the second place, to me, there is no -- as I have said, there is no comparison between Hawaiians and Indians. The Hawaiians are just like any other race and the Indians have been subject in tribal communities to the government of the United States because of inferiority, that is the language of the Supreme Court of the United States.

In the second place, the specific grants by general law to soldiers and sailors is a classification that is based upon service.

HAYES: Since a little -- I mean, since they talked about the Constitution, I'd like to make my own statement in regard to that. Certainly we are here to draft a good constitution. It must be good in the eyes of God and men. A constitution which fails to provide rehabilitation provisions for a native people who have lost the use of their land is not a good constitution no matter in what land this constitution may be devised.

HOLROYDE: I'd like to second the motion for the previous question.

SILVA: Point of information. I'd like to ask the delegate from Molokai, the word "native" deriving from the word "nativity," I just wanted to know what the true definition of the word "native" is. Am I a native of the Hawaiian Islands? Am I a native?

HAYES: I think unquestionably you are, but I do not think you are of the race who was present here when Vancouver and Cook arrived.

SILVA: I'm talking about --

CHAIRMAN: The Chair rules that this discussion is out of order. The previous question has been moved and now seconded.

FUKUSHIMA: I rise to a point of information. What is the motion now?

CHAIRMAN: The motion is for the previous question.

FUKUSHIMA: I mean the original motion, the principal motion.

CHAIRMAN: The principal motion is to adopt the first section of Committee Proposal No. 6, deleting the last sentence thereof.

FUKUSHIMA: Is that --

SILVA: The question was out of order.

FUKUSHIMA: Is that a committee motion or is that the motion by one of the delegates?

A. TRASK: It's the motion by --

CHAIRMAN: Delegate Crossley.

A. TRASK: -- Delegate Crossley of Kauai, seconded by Dr. Apoliona from the fourth district.

FUKUSHIMA: Isn't that motion in the form of an amendment?

CHAIRMAN: No, it is not. The other motions were withdrawn and this is a new motion made.

A. TRASK: The motion as made - -

FUKUSHIMA: Yes, but this is a committee proposal, Mr. Chairman, which has passed first reading.

A. TRASK: The committee as the delegates should know, did meet and the motion as made by Delegate Crossley is a committee proposal as amended, deleting the last sentence of Committee Proposal No. 6.

FUKUSHIMA: If that is so, that's not a proper procedure because Committee Proposal No. 6 as drafted and as before us now has passed first reading. And this is upon second reading and it's before the Committee of the Whole. If it's an amendment, it should be an amendment to the committee proposal and not as a committee proposal - - a committee amendment.

CROSSLEY: For the delegate's information, I made that motion because I understood that they wanted to take this entire proposal up section by section, but if it's caused any confusion, I'll withdraw my motion.

CHAIRMAN: Motion then to adopt this has been withdrawn, and the second has withdrawn his second leaving nothing before the committee at the present moment.

A. TRASK: At this time, on behalf of and at the suggestion of Madam Chairman Flora Hayes, the committee desires to amend Committee Proposal No. 6 by deleting the last sentence thereof of this first section reading as follows: "Such appropriations for administration expenses of the Hawaiian Homes Commission shall never be less than, after due consideration of the receipts applicable to such expenses from the Hawaiian Homes lands, will accord said commission equal treatment with other departments of the State in the funds available for its administration expenses."

NIELSEN: Well, I thought the proper procedure was to vote on the amend - - make the motion to adopt the section; then let someone amend it deleting that; then vote on the amendment and then on the section. I think that's the proper procedure.

CHAIRMAN: Will Delegate Trask withdraw his motion in order to - -

A. TRASK: That was my motion, that the last sentence thereof be deleted, and I did name expressly that the - -

CHAIRMAN: Has that motion been seconded?

CROSSLEY: I second the motion.

CHAIRMAN: It has been moved and seconded that we amend Section 1 of Committee Proposal No. 6 by deleting the last sentence thereof - -

A. TRASK: Of Section 1.

CHAIRMAN: - - of Section 1.

NIELSEN: There's nothing before the house right now.

TAVARES: In spite of all of this monkey business about procedure, isn't the question now this? That we move that when this committee rises, if it adopts Section 1, it recommend that the sentence in question be deleted. Wouldn't that be the proper motion?

HAYES: Thank you. That's just what I was going to say.

ANTHONY: I think most of the delegates are in agreement that the last sentence should be deleted. It seems to me that the appropriate procedure would be to move that the section be adopted. When that has been done, then there can be a motion to amend that motion to delete the last sentence; then you can vote on the amendment and the decks will be cleared. In order to make the - - clear the ground, therefore, I move that the section be adopted. Section 1.

DELEGATE: I'll second that.

BRYAN: May I rise to a point of information? Is it not the committee intent that they actually amend their proposal, so that what is before the house now is the adoption of Section 1 as the committee proposes it? And as they propose it, they leave off the last sentence. I think that's the point that - -

CHAIRMAN: In view of the technical points being raised, Delegate Trask, will you withdraw your motion so that we can get this before the committee?

A. TRASK: Expeditiously, yes.

CHAIRMAN: Delegate Anthony has moved that - -

A. TRASK: And I second Delegate Anthony's motion.

ANTHONY: I move that Section 1 of Committee Proposal No. 6 be adopted.

A. TRASK: I second the motion.

CHAIRMAN: It has been moved and seconded that Section 1 of Committee Proposal No. 6 be adopted. All those in favor say "aye."

KAUHANE: Mr. Chairman.

NIELSEN: Wait a minute.

KING: Mr. Chairman.

CROSSLEY: Mr. Chairman, Mr. Chairman.

KING: That was merely to put the section before the Convention.

CROSSLEY: I move an amendment to the previous motion. I move that it be amended to delete the last sentence.

SAKAKIHARA: I second the motion.

CHAIRMAN: We have now a motion to amend the original motion by deleting the last sentence to the first section of Committee Proposal No. 6.

DELEGATES: Question.

CHAIRMAN: Question has been called for. All those in favor of the motion to amend please say "aye." Those opposed. It is carried.

HAYES: I move Section 2.

SAKAKIHARA: Mr. Chairman.

BRYAN: Mr. Chairman.

APOLIONA: Mr. Chairman.

DELEGATE: Second.

CHAIRMAN: Delegate Hayes has the floor, unless you wish to relinquish it.

HAYES: I believe that we go on with Section 2.

NIELSEN: Point of order.

SAKAKIHARA: Point of order, Mr. Chairman. Point of order.

APOLIONA: Mr. Chairman.

SAKAKIHARA: Point of order.

CHAIRMAN: I believe we've already acted on the motion to take them one at a time.

SAKAKIHARA: Now, therefore - -

DELEGATE: Mr. Chairman.

SAKAKIHARA: Point of order, Mr. Chairman.

CHAIRMAN: Delegate Sakakihara. State your point.

SAKAKIHARA: Since the motion to amend carried, the proposal as amended must be adopted.

APOLIONA: At this time I move the adoption of Section 1 as amended.

DOWSON: I second the motion.

CHAIRMAN: It has been moved and seconded for the adoption of Section 1 of this proposal as amended.

KELLERMAN: Am I correct in my interpretation of these two sections, that Section 1 writes into the Constitution the Hawaiian Homes Commission Act as a law and that Section 2 makes a compact with the United States to write it into the Constitution as a law? Is that correct?

CHAIRMAN: Will some member of the committee answer? Delegate Trask.

HAYES: It's my understanding that that is correct, compact with United States. Otherwise, we are making a treaty with the United States. The word "compact" would be a treaty.

KELLERMAN: May I ask a second question then? Why is it necessary to adopt one section writing into the Constitution the Hawaiian Homes Commission Act as a law and making a -- then adopting a second section agreeing with the United States government under compact to write it in as a law? It seems to me that we're doing the same thing twice and it would have the following consequences. Should there eventually be a change in the compact agreement, you still have the Constitution to deal with and certain provisions which are written into the Constitution which are not subject to amendment. You therefore have to amend the Constitution in addition to altering your compact agreement. Now is that the understanding and desire of this Convention to adopt -- Is it the understanding of the Convention that we are adopting the act as a law in the Constitution, which then would require an amendment of the Constitution to change it? Certainly this sentence just preceding the sentence that has just been deleted is an outright provision. It does not refer to amendment by the legislature or the Congress. In the second place, we are agreeing with the Congress to enter into a compact to adopt it as a law, and that compact could be changed with the consent of the United States. Now it seems to me we're getting unnecessarily involved in having it in the Constitution in one section and subject to the compact in the second section. I'd like to have that explained, any reason why that complicated procedure must be followed. It seems to be totally unnecessary and restricting any possible action that may be made, in some instances, even to amend the compact, because it's in the Constitution.

CHAIRMAN: A question has been put to the Chair.

HAYES: Delegate King will answer that, Mr. Chairman.

ANTHONY: The purpose of the proposal is twofold. One, the first section will embody the act in the Constitution. Standing alone, if that were just in the Constitution and nothing more, then by a subsequent action of subsequent conventions that section could be repealed. As I understand the draftsman, in order to remove that difficulty they have gone one step further and said, not only shall it be written into the Constitution, but there shall be a compact with the United States. Now, what Delegate Kellerman is concerned about is the necessity of the two sections. I as a lawyer don't think that two sections are necessary; the compact would be sufficient. But the purpose in having it in two sections, as I understand it, is, one, to put it in the Constitution, and that is not sufficient because a subsequent convention might change it. So they have added a second section which would require the entry of a compact between the United States and the State providing that it could not be changed without the consent of the Congress.

TAVARES: I think one further explanation will clear this up. If you will read Section 1 carefully, it has this proviso: "Provided further that if the United States shall have provided or shall provide that particular provisions or types of provisions of said act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended." That takes all the pilikia out of the situation, because if Congress in the future consents to have us amend that act, then we can amend it and we don't need to amend our Constitution.

HAYES: I was just going to say that that section complies with the apparent will of Congress and continues the recognition by the people of Hawaii of the justice of the original enactment of the Hawaiian Homes Commission Act as of 1920. That is my interpretation from the attorney general's office.

KELLERMAN: It seems to me that this first section is unnecessary and it may get us in trouble. It looks to me like an open-end agreement that even after we have become a state and have entered into a compact as a condition precedent to becoming as a state, that we are agreeing that we may still abide by and consent to, in advance, provisions that subsequent legislation of Congress may request us to abide by under the terms of that compact. As I see it, that would be clearly unconstitutional and not what we intend to do. As far as I can see we are getting in trouble in the first section and this matter would be entirely cleared up if the provisions of the first section insofar as are required by Act 49, were incorporated in the second section, which is the compact section. For that reason when the vote is taken, I shall vote against Section 1, although I am not opposed to the compact on the subject matter involved.

PHILLIPS: I might point out here that during one of the committee meetings in Public Lands it was pointed out that there is constitutional interpretation on this business of bringing -- of letting a state into the Union under terms that were unequal with other states as they entered the Union. I refer specifically to *Coyle vs. Smith* in which a compact was made with the Congress whereby, I believe it was, the capital was at Guthrie, and it was agreed that for the next ten years the capital would not be moved from Guthrie, either ten or 20 years. Immediately after Oklahoma got its statehood, they proceeded to move the capital from Guthrie to Oklahoma City, where it is situated today. The decision on that in court was that there was no other state had been permitted to enter the Union under such conditions, and thereby they rendered it void. The same thing I believe applies here.

I believe it's an answer to Delegate Kellerman's question, and that is that Section 2 is at best just redundant. It wouldn't assure anybody of anything. There is no way we could insure a compact with the Congress to do something on the condition that we let -- that on the one hand we let Hawaii into the Union; and then, secondly, the Congress, because of the reserved powers, would not have any way of enforcing that after we did get into it. So it would be useless to have this redundant section even attached here. Section 1 covers everything.

MIZUHA: I move the previous question.

CHAIRMAN: The motion has been made for the previous question and seconded. All those in favor say "aye." Those opposed. Carried.

The question then before the committee is, as I understand it, for the adoption of Section I of Committee Proposal 6 as amended. All those in favor say "aye." Those opposed. Carried.

HAYES: I'd like to move for the adoption of Section 2.

HOLROYDE: I'll second that.

CHAIRMAN: Moved and seconded for the adoption of Section 2 of Committee Proposal 6. Question has been called for.

TAVARES: I assume that since the committee members have agreed to numbering this section as Section 2, that the blank space in there should be filled in with a number one, and I so move.

CHAIRMAN: Moved and seconded to insert the number one in the fifth line of the second section.

CROSSLEY: It was my understanding that these sections were numbered one and two only for the convenience of speaking on them today. Is that correct?

TAVARES: Then, for purposes of the record, let it be understood that that blank space refers to the preceding section.

CHAIRMAN: Do you then withdraw your motion and leave it to the Committee on Style?

TAVARES: I withdraw my motion.

CHAIRMAN: And the second?
We have then before us the adoption of the second section of Committee Proposal 6. All those in favor say "aye." Those opposed. It is carried.

HAYES: I move that the Committee of Whole report progress on Proposal No. 6 and the committee report - -

CHAIRMAN: We have the committee report.

HAYES: I move for the adoption of the committee report and the Proposal No. 6 as amended.

APOLIONA: I second Madam Chairman's motion.

TAVARES: In speaking against that motion, I should like to point out that it will be irregular. What we did with respect to the first health amendment was this. We prepared a Committee of the Whole report and we asked that the original report be filed and the Committee of the Whole report be adopted. This way, you are amending the report and I don't think that would be regular. I think that procedure should be followed and that the motion should be that this committee rise, report progress, ask leave to sit again; and in the meantime prepare a written report.

HAYES: I accept that. Thank you very much.

CHAIRMAN: I understand you have withdrawn your motion and the second and that we have Delegate Tavares' motion.

SAKAKIHARA: I'll second Delegate Tavares' motion.

CHAIRMAN: That the Committee of the whole rise, report progress, and beg leave to sit again. Question. All those in favor of that motion please say "aye." Those opposed. It's carried.

CHAIRMAN: Committee of the Whole please come to order. You will find a copy of the report of the Committee of the Whole, No. 3, attached to the agenda for the day.

HAYES: Many of the members don't seem to have their copies of the committee report and they are going over it now to try and locate it.

MAU: I move we take a recess, subject to the call of the Chair.

CHAIRMAN: Is there a second to that motion?

DELEGATE: I second the motion.

CHAIRMAN: Moved and seconded that we take a recess subject to the call of the Chair. All those in favor say "aye." Opposed. It is carried.

(RECESS)

CHAIRMAN: The Chair would like to call your attention to the need for a correction in the Committee of the Whole Report No. 3. Under numbered paragraph No. 1, which reads, "Begs leave to report that it has had the same under consideration and recommends: (1) that Standing Committee Report No. 33 be filed and its recommendations adopted," we should insert there, "with the exception of the recommendation as to Committee Proposal No. 6."

PORTEUS: I think the announcement by the chairman, since this is his report of that amendment, that no action is necessary by the Committee of the Whole as to the particular amendment and I think it's now in order for the chairman of the Committee on Hawaiian Homes Commission Act to move the adoption or the approval of your report.

HAYES: I so move, that we adopt the report of the chairman.

J. TRASK: Second the motion.

CHAIRMAN: It has been moved and seconded that the Committee of the Whole Report No. 3 on the Hawaiian Homes Commission Act be adopted in accordance - - as amended by the Chair. Are you ready for the question? All those in favor of the motion say "aye." Those opposed. It's carried.

PORTEUS: I think under these circumstances that was equivalent to a motion that this committee now rise and the chairman then report to the Convention that the committee recommends the adoption of the committee report as presented by the chairman. I think it's now time for the committee to rise, if there's no objection.

CHAIRMAN: Moved and seconded that the committee now rise, having finished its work. All those in favor say "aye." Those opposed. Carried.

STATEHOOD FOR HAWAII

WEDNESDAY, MARCH 19, 1947

HOUSE OF REPRESENTATIVES,
COMMITTEE ON PUBLIC LANDS,
Washington, D. C.

The committee met, pursuant to adjournment, at 2:25 p. m., in the committee room of the House Committee on Public Lands, the Honorable Richard J. Welch (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order, please.

We will take up for further consideration H. R. 48, a bill to enable the people of Hawaii to form a constitution and State government and to be admitted into the Union on an equal footing with the original States.

A number of communications have been received since the last meeting of the committee with reference to H. R. 49. I will ask the clerk to read them so that they will be made a matter of record.

Mr. GRANT. The first is a communication from the temporary clerk, house of representatives, twenty-fourth legislature of the Territory of Hawaii, transmitting resolution No. 8, adopted by the house of representatives of the Territory.

This is certified to, sir, by the speaker of the house of representatives and the temporary clerk of the house of representatives.

The CHAIRMAN. If there is no objection, it will be made a part of the record.

(The document is as follows:)

TERRITORY OF HAWAII,
HOUSE OF REPRESENTATIVES,
Honolulu, T. H., March 12, 1947.

Hon. RICHARD J. WELCH,
Chairman of the Committee on Public Lands of the
House of Representatives of the Congress of the United States,
Washington, D. C.

SIR: I have the honor to transmit herewith House Resolution No. 8 which was this day adopted by unanimous action of the House of Representatives of the Twenty-fourth Legislature of the Teritory of Hawaii.

Very respectfully,

LOAREZ,
Temporary Clerk, House of Representatives,
Twenty-fourth Legislature of the Territory of Hawaii.

RESOLUTION

Whereas Texas and Hawaii constitute the only examples of independent republics annexed to the United States of America by joint resolution of annexation; and

Whereas, in the case of Texas, the Republic ceded to the United States only public works and property pertaining to the public defense, retaining all vacant and unappropriated lands (5 Stat. 797-8); and

Whereas the Republic of Hawaii, by reason of the fact that it was annexed as a Territory of the United States and was not directly admitted to statehood, did cede to the United States the legal title to its lands but retained, for the benefit of the inhabitants of the Hawaiian Islands, all revenue from or proceeds of the same, except such lands as might be occupied for the purposes of the United States (article II of Treaty of Annexation of 1897, ratified by the Senate of the Republic of Hawaii September 9, 1897, and accepted by the United States by the joint resolution of July 7, 1898, 30 Stat. 750); and

Whereas it has been recognized that the people of Hawaii, notwithstanding the cession so made, remained the beneficial owners of their public lands (*United States* v. *Fullard-Leo*, 156 F. 2d 756, 760, certiorari granted October 14, 1946), and in section 73 (q) of the Hawaiian organic act such lands are referred to by Congress as "public lands of Hawaii"; and

Whereas the public lands of Hawaii have continued to be administered under the land laws of Hawaii, which were approved by Congress (sec. 73 (c) of the Hawaiian Organic Act); and

Whereas the requirment that the Government of the United States be provided with such public lands of Hawaii as might be needed for its civil, military, or naval purposes has been fulfilled during the period of nearly 50 years which has elapsed since annexation, and section 4 of H. R. 49 makes provision for the retention of such lands by the Federal Government, together with lands owned by the Territory of Hawaii which have been set aside by executive order of the Governor of Hawaii for the use of the United States; and

Whereas, in the case of Puerto Rico, by the act of July 1, 1902 (32 Stat. 731), the United States granted to the people of Puerto Rico their public lands, except those required for the use of the United States Government: Now, therefore, be it

Resolved by the House of Representatives of the twenty-fourth legislature of the Territory of Hawaii, That the Congress of the United States be and it is hereby respectfully urged to make no amendment of the Hawaii statehood bill which would divest the people of Hawaii of the public domain preserved for their benefit by agreement with the United States upon the annexation of the Republic of Hawaii; and be it further

Resolved, That certified copies of this resolution be transmitted to the Honorable Richard J. Welch, chairman of the Committee on Public Lands of the House of Representatives of the Congress of the United States; the Honorable Julius A. Krug, Secretary of the Interior; and the Delegate to Congress from Hawaii.

THE HOUSE OF REPRESENTATIVES OF THE TERRITORY OF HAWAII,
Honolulu, T. H., March 12, 1947.

We hereby certify that the foregoing resolution was this day adopted by unanimous action by the House of Representatives of the twenty-fourth legislature of the Territory of Hawaii.

M. G. PASCHOAL,
Speaker, House of Representatives.
LOAREE,
Temporary Clerk, House of Representatives.

Mr. GRANT. I have a similar resolution, in the same language, I believe, from the clerk of the senate of the twenty-fourth legislature of the Territory of Hawaii.

The CHAIRMAN. It will be made a part of the record.

(The document is as follows:)

TERRITORY OF HAWAII,
Honolulu, T. H., March 12, 1947.

Hon. RICHARD J. WELCH,
Chairman, Committee on Public Lands,
House of Representatives, Washington, D. C.

SIR: I have the honor to transmit herewith certified copy of Senate Resolution 37, which was this day adopted by the Senate of the Territory of Hawaii.

Very respectfully.

ELLEN D. SMYTHE,
Clerk of the Senate.

SENATE RESOLUTION 37

Whereas Texas and Hawaii constitute the only examples of independent republics annexed to the United States of America by joint resolution of annexation; and

Whereas in the case of Texas, the republic ceded to the United States only public works and property pertaining to the public defense, retaining all vacant and unappropriated lands (5 Stat. 797–798); and

Whereas the Republic of Hawaii by reason of the fact that it was annexed as a Territory of the United States and was not directly admitted to statehood, did cede to the United States the legal title to its lands but retained, for the benefit of the inhabitants of the Hawaiian Islands, all revenue from or proceeds of the same, except such lands as might be occupied for the purposes of the United States (article II of Treaty of Annexation of 1897, ratified by the Senate of the Republic of Hawaii September 9, 1897, and accepted by the United States by the joint resolution of July 7, 1898, 30 Stat. 750); and

Whereas it has been recognized that the people of Hawaii, notwithstanding the cession so made, remained the beneficial owners of their public lands (*United States* v. *Fullard Leo*, 156 F. 2d 756, 760, certiorari granted October 14, 1946), and in section 73 (q) of the Hawaiian Organic Act such lands are referred to by Congress as "public lands of Hawaii"; and

Whereas the public lands of Hawaii have continued to be administered under the land laws of Hawaii, which were approved by Congress (sec. 73 (c) of the Hawaiian Organic Act); and

Whereas the requirement that the Government of the United States be provided with such public lands of Hawaii as might be needed for its civil, military, or naval purposes has been fulfilled during the period of nearly 50 years which has elapsed since annexation, and section 4 of H. R. 49 makes provision for the retention of such lands by the Federal Government, together with lands owned by the Territory of Hawaii which have been set aside by executive order of the Governor of Hawaii for the use of the United States; and

Whereas in the case of Puerto Rico, by the act of July 1, 1902 (32 Stat. 731), the United States granted to the people of Puerto Rico their public lands, except those required for the use of the United States Government: Now, therefore, be it

Resolved by the Senate of the Twenty-fourth Legislature of the Territory of Hawaii, That the Congress of the United States be and it is hereby respectfully urged to make no amendment of the Hawaii statehood bill which would divest the people of Hawaii of the public domain preserved for their benefit by agreement with the United States upon the annexation of the Republic of Hawaii; and be it further

Resolved, That certified copies of this resolution be transmitted to the Honorable Richard J. Welch, chairman of the Committee on Public Lands of the House of Representatives of the Congress of the United States, the Honorable Julius A. Krug, Secretary of the Interior, and the Delegate to Congress from Hawaii.

THE SENATE OF THE TERRITORY OF HAWAII,
Honolulu, T. H., March 12, 1947.

We hereby certify that the foregoing resolution was this day adopted by the Senate of the Territory of Hawaii.

CLEMENT GOMES,
President of the Senate.
ELLEN D. SMYTHE,
Clerk of the Senate.

The CHAIRMAN. I have here a cablegram.

Mr. GRANT. There is also a cablegram from the president of the Bar Association of Hawaii, strongly recommending that in connection with any amendment of Hawaii statehood bill concerning jurisdiction over military and naval reservations, State of Hawaii be given right to serve civil process as well as criminal process and taxing powers, same as in Hawaii National Park Act.

I have a communication enclosing a statement of the American Veterans' Committee, endorsing H. R. 49 and a communication from

the Long Island City Lions Club enclosing a resolution adopted by that body, recommending the passage of H. R. 49.

The CHAIRMAN. Without objection they will be made a part of the record.

(The papers are as follows:)

MK1041/15 HONOLULU.

RICHARD J. WELCH,
Chairman, Committee on Public Lands, House of Representatives, Washington, D. C.:

Bar Association of Hawaii strongly recommends that in connection with any amendment of Hawaii statehood bill concerning jurisdiction over military and naval reservations State of Hawaii be given right to serve civil process as well as criminal process and taxing powers, same as in Hawaii National Park Act.

RUSSELL CADES,
President Bar Association.

AMERICAN VETERANS COMMITTEE (AVC),
Washington 6, D. C., March 13, 1947.

HON. RICHARD J. WELCH,
Chairman, House Public Lands Committee,
New House Office Building, Washington, D. C.

DEAR MR. WELCH: I am enclosing a statement giving the views of the American Veterans Committee (AVC) on the question of statehood for Hawaii. We have a number of chapters and a proportionately large membership in Hawaii who are deeply interested in this question. In addition, as you will note from our testimony, our members went on record at our last national convention in favor of the admission of Hawaii, as the forty-ninth State.

I hope it will be possible to make the enclosed statement a part of the record of the hearings which have recently been held on the subject.

Sincerely yours,

ANDREW L. NEWMAN, Jr.,
Public Relations Director.

STATEMENT OF AVC ON STATEHOOD FOR HAWAII

The first national convention of the American Veterans Committee (AVC) at Des Moines, Iowa, on June 16, 1946, adopted as part of its domestic policy platform (XIII. Territories and possessions) this statement concerning the Territory of Hawaii:

"We favor the immediate admission of the Territory of Hawaii as the forty-ninth State."

This policy was adopted after a careful study of the text of the report of the House Territories Subcommittee. This excellent report gives in great detail the picture of a community in which government, agriculture, industry, and labor work together effectively providing a well ordered economic and spiritual basis for living in the best American tradition. The educational, civic and religious institutions in the Territory are of a caliber comparable to those of any State in the Union.

Of particular interest to us as citizens, is the principle of self-determination that is at stake. For almost half a century, the residents of Hawaii have had a Territorial status. In that time, the people residing in the Territory have learned the principles of sound government and have demonstrated, again and again, their loyalty to the United States. The overwhelming sentiment of the residents is to become citizens of a State so that they can accept their full measure of responsibility. We believe they are ready for this status.

Of particular interest to us as veterans is the demonstration of the loyalty of the people of Hawaii as evidenced by their war record. Thirty-three thousand sons and daughters of Hawaii served in the armed forces. The combat records of the One Hundredth Battalion and the Four Hundred Forty-second Regiment recruited [illegible]

Members of AVC had had a singular opportunity to observe at first hand the Hawaiian community. Early in 1946, the Territory chapter undertook to examine the restrictions on travel to the mainland then extant. Due to the high degree of public spirit displayed by water and air carriers and Federal Immigration Service and Territorial officials, it was possible to reexamine these regulations and come to a mutually acceptable understanding in a short period of time.

The strategic position the Territory plays in the international picture must be considered. Within the Territory reside peoples of many racial strains. It is our belief the desire for self-government is an ultimate goal toward which all peoples strive. The peoples of Asia are watching closely the development of democratic progress in the Territory. Statehood for that area will build a reservoir of good will among supporters of the democratic tradition in the Far East.

We believe the Territory has proven its maturity and is ready for statehood; we believe the United States has an opportunity to give positive demonstration of its leadership for the democratic method of government and life; and we, therefore, urge the Congress take the necessary steps to admit the Territory of Hawaii as the forty-ninth State.

LONG ISLAND CITY, N. Y., LIONS CLUB,
March 12, 1947.

CHAIRMAN, COMMITTEE ON TERRITORIES,
House of Representatives,
Washington, D. C.

SIR: The Long Long Island City Lions Club, a member of the International Association of Lions Clubs, has directed me to send to you a copy of a resolution recently adopted endorsing favorable action by the Congress of the United States, to enable Hawaii to be admitted as a State.

We sincerely believe that the people of Hawaii have unquestionably demonstrated their fitness to receive and enjoy the benefits of statehood.

A copy of said resolution is enclosed.

Sincerely yours,

J. C. PERRY, *Secretary.*

RESOLUTION FAVORING STATEHOOD FOR HAWAII

Whereas there are pending in the House of Representatives and the Senate of the Congress of the United States bills to enable the people of Hawaii to form a constitution and be admitted as a State in the American Union, to wit: H. R. 3643, introduced by Delegate Farrington, of Hawaii; H. R. 3659, introduced by Representative Hale, of Maine; H. R. 3690, introduced by Representative LaFollette, of Indiana; and S. 1830, introduced by Senator Knowland, of California; and

Whereas the question presented to the American people by these bills is Hawaii's right to statehood now; and,

Whereas Hawaii was annexed as a Territory of the United States by mutual agreement between the former Republic of Hawaii and the United States, and such annexation has been of immeasurable value to the United States as well as the people of Hawaii; and,

Whereas Hawaii and Alaska are the only remaining Territories of the United States, the other 29 Territories which have been organized in the history of the Union all having been admitted to statehood; and,

Whereas it was well understood when Hawaii was organized as a Territory that it, too, would be admitted as a State, the Territorial form of government being necessarily only a transitory one, to be followed by statehood as soon as the people of the Territory are capable of self-government; and,

Whereas in the 48 years since annexation of Hawaii it has become a modern American community, with a sound economy and a healthy and literate people, who have shown themselves to be fully capable of self-government; and,

Whereas the people of Hawaii have demonstrated beyond question their loyalty and patriotism to the Government of the United States, as found by the Statehood Subcommittee of the House of Representatives on January 24 of this year in a report concluding that "The Territory of Hawaii now meets the necessary requirements for statehood; and

Whereas the Secretary of the Interior in December 1945, and the President

have been devoting their efforts to promoting the theory and practice of good government and good citizenship and have contributed much to establishing the undeniable fact that the people of Hawaii are, and for some time have been, capable of self-government and, therefore, are entitled to receive and enjoy the right of statehood: Now therfore, be it

Resolved by the Lions Club of Long Island City, N. Y., That this organization endorse and it hereby goes on record as favoring immediate action by the Congress of the United States to enable Hawaii to be admitted as a State; and, be it further

Resolved, That copies of this resolution be sent to the President of the United States, the chairman of the Committee on Territories of the House of Representatives of the Congress, the chairman of the Committee on Territories and Insular Affairs of the Senate of the Congress, the Secretary of the Interior, the Delegate to Congress from Hawaii, the Governor of Hawaii, and to Mr. Henry A. Nye, district governor, Lions International, at his office, Box 129, Honolulu, T. H.

RESOLUTION OF LION'S CLUB OF LAKE MILLS, WIS., FAVORING STATEHOOD FOR HAWAII

Whereas there are pending in the House of Representatives and the Senate of the Congress of the United States bills to enable the people of Hawaii to form a constitution and be admitted as a State in the American Union, to wit, H. R. 3643, introduced by Delegate Farrington of Hawaii, H. R. 3659, introduced by Representative Hale of Maine; H. R. 3690, introduced by Representative LaFollette, of Indiana; and S. 1830, introduced by Senator Knowland, of California; and

Whereas the question presented to the American people by these bills is Hawaii's right to statehood now; and

Whereas Hawaii was annexed as a Territory of the United States by mutual agreement between the former Republic of Hawaii and the United States, and such annexation has been of immeasurable value to the United States as well as the people of Hawaii; and

Whereas Hawaii and Alaska are the only remaining Territories of the United States, the other 29 Territories which have been organized in the history of the Union all having been admitted to statehood; and

Whereas it was well understood when Hawaii was organized as a Territory that it too would be admitted as a State, the Territorial form of government being necessarily only a transitory one, to be followed by statehood as soon as the people of the Territory are capable of self-government; and

Whereas in the 48 years since annexation of Hawaii it has become a modern American community, with a sound economy and a healthy and literate people, who have shown themselves to be fully capable of self-government; and

Whereas the people of Hawaii have demonstrated beyond question their loyalty and patriotism to the Government of the United States, as found by the Statehood Subcommittee of the House of Representatives on January 24 of his year in a report concluding that: "The Territory of Hawaii now meets the necessary requirements for statehood"; and

Whereas the Secretary of the Interior in December 1945, and the President of the United States in January of this year, unqualifiedly endorsed immediate statehood for Hawaii; and

Whereas for the furtherance of democracy and the safety and solidarity of our Nation: Now, therefore, be it

Resolved by the Lake Mills Lions Club, Lake Mills, Wis., That this organization endorse and it hereby goes on record as favoring immediate action by the Congress of the United States to enable Hawaii to be admitted as a State; and be it further

Resolved, That copies of this resolution be sent to the President of the United States, the chairman of the Committee on Territories of the House of Representatives of the Congress, the chairman of the Committee on Territories and Insular Affairs of the Senate of the Congress, the Secretary of the Interior, the Delegate to Congress from Hawaii, the Governor of Hawaii; and Senators Wiley and McCarthy.

HERBERT E. BUTTERHARDT.

The CHAIRMAN. We will now take up the proposed amendments to H. R. 49. Some of the amendments have been adopted; others have been tentatively agreed to. I feel, however, that it would be well to have the amendments read and considered in their order. Will the clerk proceed to read the amendments?

Mr. GRANT. Yes, sir.

Mr. FARRINGTON. Mr. Chairman, a parliamentary inquiry.

I would like to ask unanimous consent first of all that I be permitted to sit at this point in the committee room and that Mr. Anthony, the former attorney general of the Territory of Honolulu, be permitted to sit with me.

The CHAIRMAN. We have the distinguished author of the bill. He may proceed as he may elect during consideration of his bill. Mr. Anthony, you may come forward.

Mr. FARRINGTON. May I inquire as to the procedure that is to be followed? As I understand it, we are going to consider the committee print of March 15. That is the second committee print, and incorporated in that print are the amendments of the Department of the Interior and of the War Department.

Mr. GRANT. That is right.

The CHAIRMAN. We will consider H. R. 49 and the amendments contained in committee print, together with the more recent amendment that is not contained in the committee print.

Mr. FARRINGTON. As I understand the procedure, the clerk will proceed to read the bill with the amendments, and at those points where I have amendments to the amendments I will be permitted to interrupt him.

The CHAIRMAN. It will not be necessary unless the committee so desires to read the entire bill. The amendments will be read in their order, and reference made to the sections and the pages.

Mr. GRANT. The first proposed amendment by the Department of Interior appears on page 5. It is in section 2, but the section 2 shows up on page 1. On page 5, line 10, the line is barred out by the printer. Substitute therefor, beginning on line 21:

> The ballots submitted to the voters of each county, precinct or combination of precincts shall separately set forth the names of candidates for delegates from each county or precinct or combination of precincts, and shall instruct the voters that the number of candidates to be voted for by such voter shall not exceed the number of delegates to which the county, precinct, or combination of precincts is entitled, or the number of such delegates remaining to be elected as the case may be, which number shall be stated.
>
> The ballots in each county shall also instruct the voters that the number of candidates to be voted for by each voter shall not be less than a majority of the number of delegates, which such county is entitled to elect at the particular election, primary or final, as the case may be, and the number consituting such a majority shall be stated.

Mr. FARRINGTON. Mr. Chairman, I move the adoption of the amendment.

Mr. ENGLE. What does the amendment do? Why did the Secretary of Interior suggest this change?

Mr. FARRINGTON. I think he feels that this clarifies the purpose of the original provision, and is an improvement on the draftsmanship of the attorney's in Hawaii. I see no objection to it, and quite

Mr. ENGEL. It doesn't clarify it for me, but if you are satisfied I am.

Mr. LEMKE. May I state that I find they both name the same man.

Mr. ENGLE. I second the motion.

The CHAIRMAN. You have heard the motion. All in favor of adopting the amendment, signify by saying "aye"; counterminded "no."

(There was general response "aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. GRANT. Page 6, lines 24, 25, the last two lines, and page 7, the first three lines, deleted, substitute therefor:

No ballot in a county ticket shall be counted at either the primary election or the final election unless the number of candidates voted for by the voters is at least equal to a majority of the number of delegates which the county concerned was entitled to elect at such election.

Mr. FARRINGTON. Mr. Chairman, I move the adoption of that amendment.

Mr. LEMKE. How many delegates are there, or will there be, in some of these precincts or districts?

Mr. FARRINGTON. The bill provides for election of a total of 63 delegates: 42 of them will be elected from individual districts, and the balance will be elected at large from the different counties, and the purpose of this amendment is to disqualify ballots which are cast for less than a majority in groups where there is voting at large.

Mr. LEMKE. But wouldn't you disfranchise a lot of people who are interested in more than one or two, and what difference would it make whether I vote for all of them or just one or two? If they have to have the same number of votes it would give one an advantage over another, but that would be pretty well restricted where everyone votes and has his particular votes. Why should you disfranchise a person who didn't want to vote for them?

Mr. FARRINGTON. The purpose of it is to cure what is commonly known in Hawaii as plunking. That is voting a short ballot. In Hawaii that is the subject of great debate. The intention of those who drafted this law was that so-called short ballots should be disqualified in the election of delegates to the constitutional convention. Representatives of both parties helped draft the law.

Mr. MURDOCK. Discourage what is known as?

Mr. FARRINGTON. Plunking. They call it plunking.

Mr. MURDOCK. Is that the same as single-shot voting?

Mr. FARRINGTON. That is right.

Mr. LEMKE. That habit doesn't only exist in his district, but in many of the States. But I have never found it to be detrimental or even to discriminate very much for or against a candidate, because they generally in the average split up pretty even anyway. I have no objection to the amendment.

Mr. FERNANDEZ. I second the motion.

The CHAIRMAN. We have heard a motion for the amendment just read. All in favor signify by saying "aye"; counterminded "no."

(There was general response "aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. GRANT. Page 9, delete lines 6 to 10. In line 11 there is this change of one word from what is in your committee print, so that it will read:

States and remaining so set aside immediately prior to the admission of the State of Hawaii into the Union is ceded to the United States, as more particularly provided in the next section of this Act.

Mr. FARRINGTON. I move the adoption of the amendment, Mr. Chairman.

Mr. LEFEVRE. I second the motion.

The CHAIRMAN. You have heard the motion. All in favor signify by saying "aye"; counterminded "no."

(There was general response "aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. GRANT. Page 9, strike out all from line 17 down through and including line 19, of page 10, and insert the following: The first part of the amendment proposed by War Department:

Fifth: That authority is granted to and acknowledged in the United States to the exercise by the Congress of the United States of the power of exclusive legislation as provided by article 1, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as are now owned by the United States, and held for military, naval, or Coast Guard purposes, whether title to such lands was acquired by cession and transfer to the United States by the Republic of Hawaii and set aside by Executive order of the President or the Governor of Hawaii for the use of the United States, or acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: *Provided*, That the State of Hawaii shall have the right to serve civil or criminal process within the said tracts or parcels of land in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed within the said State but outside of the said tracts or parcels of land; and the legislative assembly is authorized and directed to enact any law necessary or proper to give effect to this article.

Sixth. That, as a compact with the United States relating to the management and disposition of the Hawaiian homelands, the Hawaiian Homes Commission Act, 1920, as amended, is adopted as a law of said State, subject to amendment or repeal only with the consent of the United States, and in no other manner: *Provided*, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the original constitution or in the manner required for ordinary State legislation, but the Hawaiian home-loan fund and the Hawaiian home-development fund shall not be reduced or impaired, and the encumbrances authorized to be placed on Hawaiian homelands by officers other than those charged with the administration of said Act shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian homelands may be made in the original constitution or in the manner required for ordinary State legislation but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from Hawaiian homelands, but not from other lands belonging to the United States, shall be available to said State for use in accordance with the terms of said Act.

Seventh. That said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property, including Hawaiian home lands, the title to which is retained in or ceded to the United States by the provisions of this Act; that until the title to such lands or other property is disposed of by the United States the same shall be and remain subject to the jurisdiction and control of the United States; that no taxes shall be imposed by said State upon any lands or other property belonging to or which may be hereafter acquired by the United States or reserved for its use; and that all provisions of this Act reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property herein made to said State, are consented to fully by said State and its people: *Provided, however*, That United States shall preserve, maintain, and develop in perpetuity the lands that now comprise the forest reserve and watersheds for the conservation purposes and the development thereof to which they are pre-

Eighth. That the lands and other property belonging to citizens of the United States residing without said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof.

Mr. FARRINGTON. I have two amendments to this amendment: The first is page 12, line 13, strike out the words, "but not from other lands belonging to the United States." The purpose of this amendment is to bring the section into harmony with the existing Hawaiian Homes Commission Act. Under section 213 of that act, 30 percent of the receipts from the lessees of cane land and water licenses are deposited in the Hawaiian home loan fund. If the language quoted above remain, then the financial set-up of the Hawaiian Homes Commission would be impaired. The change makes for a continuity with the existing legislation, and administration of the Hawaiian Homes Commission Act.

I believe that the Department of the Interior, in drafting this amendment, which reserves for the Federal Government any basic changes in the Hawaiian Homes system, overlooked this feature of the law. I move the adoption of the amendment to the amendment.

The CHAIRMAN. You have heard the amendment just read, known as the War Department amendment, together with the amendment to the so-called War Department amendment offered by the Delegate from Hawaii. Are we ready for the question?

Mr. D'EWART. Haven't you another amendment for page 13?

Mr. FARRINGTON. Yes. I have another amendment to that amendment and that is to strike out the seventh paragraph, beginning on line 17, as that is being superseded by an amendment that will be offered to page 15.

Mr. ENGLE. This is not the War Department amendment. The War Department amendment is section 5 on page 10.

Mr. FARRINGTON. That is right.

Mr. ENGLE. Section 60, on page 11, are the provisions of the original H. R. 49, with the suggested changes made in it by the Interior Department; is that not correct?

Mr. FARRINGTON. That is right.

Mr. ENGLE. And I still do not understand, Mr. Farrington, why you want to strike out the words, "but not from other lands belonging to the United States."

Mr. FARRINGTON. That is the section relating to the future of the Hawaiian Homes Commission. Under the law at present, the Hawaiian Homes Commission receives 30 percent of the Territory's realizations from the lessees of cane lands and water licenses. They are not Hawaiian home lands.

Mr. ENGLE. They are lands which belong to the United States but are held in trust for the people of Hawaii.

Mr. FARRINGTON. They are what we have been describing as Territorial lands. They are public lands administered by the Territory.

Mr. ENGLE. In other words the Department of the Interior language had the effect of taking that out, because it excludes the other lands held by the United States.

Mr. FARRINGTON. Yes. It takes away from the Hawaiian Homes Commission the benefit of that revenue, which are revenues from the public land, and I cannot believe that was intended. If it was, it certainly was in error.

Mr. LEMKE. Are you sure your amendment remedies this situation you are talking about now?

Mr. FARRINGTON. I think so.

Mr. MURDOCK. It makes it consistent with the agreements that have been entered into with the Interior Department?

Mr. FARRINGTON. We have no agreement with the Interior Department that I know of.

Mr. MURDOCK. I thought there had been some amendments that were considered.

Mr. FARRINGTON. They have agreed or I have agreed to most of their amendment, but not all of them, as will develop subsequently.

Mr. ENGLE. Taking this piece by piece, can we prove this amendment and then proceed to the next one? If we approve the amendment to the amendment, that is the way to do it?

Mr. GRANT. That is right.

Mr. ENGLE. I move the adoption of this amendment to the amendment which consists of striking the words, "but not lands belonging to the United States" at pages 13 and 14.

Mr. FARRINGTON. I will withdraw my motion.

Mr. LEMKE. I second the motion.

The CHAIRMAN. The motion is on the amendment to the amendment. All in favor signify by saying "aye." Counterminded "no."

(There was general response "aye.")

The CHAIRMAN. The eyes have it. It is so ordered.

Mr. FARRINGTON. Mr. Chairman, I now move that that portion of the amendment beginning on line 17, with the word "seventh" continuing through page 13, down through line 10, be stricken.

Mr. GRANT. Do you want to move first that sections fifth and sixth as amended be adopted?

Mr. LEMKE. Did I understand you to say that would be covered in a different way in another part of the bill?

Mr. FARRINGTON. That is right.

Mr. LEMKE. Why not pass this until we find out what that other part will be?

Mr. FARRINGTON. All right with me.

Mr. ENGLE. If the gentleman will withdraw his motion I will make a motion.

Mr. FARRINGTON. I will withdraw my motion.

Mr. ENGLE. Mr. Chairman, I move the acceptance of amendments fifth and sixth as amended.

Mr. CRAWFORD. That is down through and including line 16, page 12.

Mr. ENGLE. That will get us down that far.

Mr. D'EWART. I second the motion.

Mr. JENISON. It is incorporated into this. I merely want to ask the question when we refer to it as the War Department amendment—has that amendment been concurred in by the Navy?

The CHAIRMAN. Yes. That is my understanding.

The CHAIRMAN. You have heard the motion. All in favor of adopting the amendment signify by saying "aye." Counterminded "no."

The ayes have it. It is so ordered.

Mr. GRANT. We can take a motion on eighth, which I read, if you want to.

The CHAIRMAN. We have covered the amendments down to line 16, on page 12.

Mr. FARRINGTON. I move that that portion of the bill beginning on page 12, line 17, with the word "seventh," and ending on line 10, page 13, with the word "devoted," be stricken from the bill.

Mr. D'EWART. I second the motion.

Mr. ENGLE. Let us get the substance, and get it all in one motion. We are going to move to substitute, are we not?

Mr. FARRINGTON. Yes. That will come in the next page.

Mr. ENGLE. But we don't want to vote to delete these articles until we decide whether we want the substitute.

Mr. FARRINGTON. Then I suggest you go to page 15.

Mr. D'EWART. I think we want to delete that article anyway.

The CHAIRMAN. The Barrett amendment will be a substitute for what is referred to as "seventh," commencing on line 17, page 12, down to line 10 on page 13, including line 10 on page 13. The clerk will read the substitute.

Mr. GRANT. That comes later.

Mr. FARRINGTON. The Barrett amendment comes on page 15, so I believe we should proceed with the reading of the bill at line 16, page 14.

The CHAIRMAN. Is it your purpose to substitute the Barrett amendment for the language contained in the bill commencing line 17, on page 12, down to and including line 14 on page 13?

Mr. FARRINGTON. It is, but not in that place. I am informed by the experts on draftsmanship that it should be placed on page 15.

The CHAIRMAN. Do you move the deletion of it?

Mr. FARRINGTON. In view of the question that has been raised by the gentleman from California, I will withhold the motion on seventh on page 12.

Mr. GRANT. How about eighth on 13?

Mr. FARRINGTON. I suggest that be withheld also, and that you start reading at section 4 (a) page 14, line 16.

Mr. GRANT. Now substitute for lines 15 to 25, on page 13, and lines 1 to 15, on page 14, the following:

SEC. 4. (a) The State of Hawaii and its political subdivision, as the case may be, shall retain all the lands and other public property title to which is in the Territory of Hawaii, or applicable subdivision thereof, except as herein provided, that all such lands and other property shall remain and be the absolute property of the State of Hawaii, and its political subdivisions, as the case may be, subject to the constitutional laws of said State: *Provided, however*, That any such lands or other property heretofore or hereafter set aside by Executive order of the President or the Governor of Hawaii, pursuant to law, for the use of the United States, whether absolutely or subject to limitations, and remaining so set aside immediately prior to the admission of the State of Hawaii into the Union, shall be and become the property of the United States absolutely or subject to such limitations, as the case may be.

Mr. FARRINGTON. I move the adoption of that paragraph.

The CHAIRMAN. You have heard the motion.

Mr. ENGLE. I second.

The CHAIRMAN. All in favor of adopting the amendment signify by saying "aye." Counterminded "no." The ayes have it. It is so ordered.

Mr. GRANT (reading):

(b) The United States and its instrumentalities, as the case may be, shall retain all the lands and other public property title to which is in the United States or an instrumentality thereof (including all lands and other property ceded to the United States by the Republic of Hawaii upon its annexation to the United States or acquired in exchange for the lands or other property so ceded), except as herein provided, and all such lands and other property shall remain and be the absolute property of the United States and its instrumentalities, as the case may be, subject to the laws heretofore or hereafter enacted by the Congress for the management and disposition of such lands: *Provided, however*, That any such lands or other property heretofore or hereafter set aside by Executive order of the President or the Governor of Hawaii, pursuant to law, for the use of the Territory of Hawaii or a political subdivision thereof, whether absolutely or subject to limitations, and remaining to set aside immediately prior to the admission of the State of Hawaii into the Union, shall be and become the property of the State of Hawaii or of such political subdivision, absolutely or subject to such limitations, as the case may be.

Mr. FARRINGTON. Mr. Chairman, it is at that point that I wish to offer an amendment covering the point that has been the subject of so much discussion in the committee.

I believe all of you have copies of this amendment on your desk. Mr. Chairman, I now move the following amendment to the amendment on page 15, beginning at line 7. It is on the first part of these sheets you have just received. Delete lines 7 to 18, including the word "lands" immediately preceding the colon on line 18, and insert in lieu of that the following:

The United States shall retain title to all the public lands and other public property, except as hereafter provided, for a period of five years Such land and public property shall continue to be administered in accordance with the laws applicable thereto, immediately prior to the admission of said State, until otherwise provided by the Congress: *Provided*, That immediately after the enactment of this Act, an investigation and report shall be made by a joint committee, composed of the members of the Committees on Public Lands of the Senate and of the House of Representatives, upon the subject of the public land and other property in Hawaii, and the Congress shall thereafter make a final determination and disposition of the remaining public lands and other public property. In the event the Congress has made no other disposition thereof within said five-year period, then title to all the public lands and other public property undisposed of shall thereupon vest in the State of Hawaii absolutely.

Mr. FERNANDEZ. As I interpret that provision, the period of 5 years begins when Hawaii is admitted to the Union, and I am not sure that is intended. It ought to be made clear, I think.

Mr. FARRINGTON. No, after the enactment of this act, that is. It begins after the enactment of this act.

Mr. FERNANDEZ. I believe it could be interpreted to mean from the date of the admission of Hawaii as a State, and I think it ought to be made clear that it means from the enactment of this act, and not from the admission of Hawaii as a State.

The CHAIRMAN. Does not Hawaii become a State after the enactment of this act?

Mr. FARRINGTON. No, sir. They have to have an election and one thing and another. It may be several years before it becomes a State.

Mr. MURDOCK. It was 2 years in the case of the last two States admitted.

Mr. ANTHONY. The proposed amendment says:

Provided, That immediately after the enactment of this Act—

that is before Hawaii becomes a State—

an investigation and report shall be made by a joint committee, and the Congress shall thereafter make a final determination and disposition of the remaining public lands.

That fixes the period of 5 years from and after the passage of this act.

Then it goes on to say—

In the event Congress has made no other disposition within said period.

Mr. FERNANDEZ. That is correct; that is the reason I thought the intent was from the enactment of this act. I think it is subject, as it stands, to the interpretation that it means from the admission of Hawaii, and I think it ought to be made clear.

Mr. ANTHONY. I do not know how the language could make it clearer.

Mr. ENGLE. All you have to do is add, after the word "years" on page 3 of the amendment, the words "after the enactment of this Act."

Mr. ANTHONY. That is correct.

Mr. FARRINGTON. I will accept that amendment, Mr. Chairman.

Mr. FERNANDEZ. It should read, "After the effective date of this Act."

Mr. ANTHONY. "After the effective date of this Act."

Mr. ENGLE. We could argue about that—the act is not effective until Hawaii becomes a State.

Mr. FERNANDEZ. It is effective when the President signs it. If you prefer "enactment," that is all right. The word usually used is "effective."

Mr. LEMKE. It might make it clearer by saying "After the enactment and approval by the President."

Mr. FERNANDEZ. That makes it doubly clear.

Mr. FARRINGTON. Mr. Chairman, I accept the amendment of the gentleman from New Mexico and the gentleman from California.

Mr. ENGLE. Let us make it "after the enactment of this Act." I think it makes it clear enough without unnecessarily encumbering it.

Mr. FARRINGTON. I will insert that after the words "5 years." I accept the amendment.

The CHAIRMAN. Do you accept the amendment offered by the gentleman from California, Mr. Engle?

Mr. FARRINGTON. Yes.

I now move the adoption of this amendment.

Mr. FERNANDEZ. I second the motion.

Mr. CARROLL. I would like to ask here whether or not, as I understand, if the Congress fails to act, then certain rights are given up which the Government now has.

I would like to ask the man who drafted this, do you think that is proper and legal, an act of omission on the part of the Government to give away something which it now has possession of?

Mr. ANTHONY. These amendments that we have just been talking about, preserve intact the existing acts of Congress relative to the public laws of the United States.

In other words, immediately after the approval of this act, and within the 5-year period, the President can set aside by Executive order any part of our public lands he desires. Now, all this does is to

say that we are presently debating what should be the ultimate policy of the Congress with respect to the public lands of Hawaii, which are held under the treaty of annexation, and the joint resolution in trust for the people of Hawaii.

That was the underlying concept. All we are saying is that Congress will study that for a period of 5 years, and make an ultimate disposition of that.

Now, in the event Congress does not act, making some other disposition, such as was contemplated in the rather complicated amendments of the Interior Department, then the title will go back.

The legal title will vest in the beneficiaries, namely, the people of the Territory of Hawaii. I see nothing detrimental to the interests of the United States in that.

Mr. ENGLE. That, itself, is an affirmative act, is it not?

Mr. ANTHONY. Yes.

Mr. CARROLL. In other words, the failure of the Government to legislate in this matter revests the title in Hawaii?

Mr. ANTHONY. We already have the beneficiary title, Mr. Carroll.

Mr. CARROLL. Where is there a legal opinion ever saying that this is held in trust?

Mr. ANTHONY. There is no such legal opinion, but the act of Congress, and also the treaty of annexation, says specifically that it shall be held in perpetuity for the benefits of the inhabitants of the Hawaii lands. Then, also, in the act of Congress, our own organic act, there is a provision that if any of these public lands which are set apart to the United States are later given up, Congress has already said, those lands then go back for the use and benefit of the people of Hawaii, showing clearly from the very beginning the intention expressed in every enactment that the people of Hawaii were the beneficiaries of the public lands of Hawaii.

Mr. CARROLL. By an act of omission, can the Congress transfer its legal title to someone else by an act of omission? I do not know that and I leave that to the more experienced members of this committee.

I do not think it can do so.

Mr. ENGLE. Will the gentleman yield?

Mr. CARROLL. Yes.

Mr. ENGLE. The proposed amendment is in itself an affirmative act, revesting the title to these properties in the State of Hawaii, provided that the Congress in the meantime has not taken specific action, otherwise disposing of these properties.

In other words, this is in effect a disposition of that, subject to a condition, and if we do not act, then in the positive terms of this last sentence which says:

> Then title to all public lands and other public property, undisposed of, shall thereupon vest in the State of Hawaii absolutely.

That makes it a disposition subject to a condition.

Mr. DAWSON. In other words, we are transferring the title now but reserving the right to change our minds when necessary within 5 years.

Mr. CARROLL. I didn't so read the amendment. "The United States shall retain title to all public lands for a period of 5 years." But it already has the title, and I am wondering if this indirect way whether

we are placing a limitation upon the period of time which we will hold the title. [Reading:]

Such public lands shall continue to be administered in accordance with the law. Until otherwise provided by Congress.

It would do so normally and legally now, without this indirect limitation.

Then the proviso comes [reading]:

That in the event that Congress does not act within this period of 5 years, then the title shall thereupon vest in the State of Hawaii.

Mr. ANTHONY. That is an affirmative grant.

Mr. LEMKE. It seems to me we are keeping title with the condition whereby it would be transferred to Hawaii unless we act, and to the contrary. I think it is perfectly legal if we want to do it.

Mr. ENGLE. I want to get one point in the record straight. I agree with the gentleman from Colorado—the title is not transferred. It is retained. But this is an act which will transfer the title automatically on certain conditions and is an affirmative act of Congress if passed. In other words, it is not, as I construe it, an act of omission which transfers title out of the United States. This is in itself an affirmative act which will automatically transfer title in 5 years unless we do something to stop it.

Mr. DAWSON. I think that is right. I merely said that is the effect of what we are doing.

Mr. FERNANDEZ. May I suggest that everything in this act is contingent, because none of it would be effective until the people of Hawaii accept it. That is a contingency in itself, and a condition in itself.

Mr. CRAWFORD. I think it would be appropriate at this minute to briefly summarize, very briefly summarize.

Here is an act that authorizes, or a proposal to authorize, the people of Hawaii to proceed to effectuate statehood. You have to elect your delegates to a constitutional convention. Those delegates in constitutional convention first have to accept the Constitution of the United States as an over-all proposition.

Then they have to submit to the people of Hawaii a constitution for the new State, according to the general outline set forth in this bill.

If the people refuse to adopt the constitution so recommended by the constitutional congress, then the matter comes back to the convention, and another constitution is submitted.

Am I right?

Mr. ANTHONY. That is right.

Mr. CRAWFORD. That second constitution is submitted directly to the people, or to the President of the United States.

Mr. FARRINGTON. The second one comes back, or goes back to the people the second time, as I understand it. Then it comes and must be approved.

Mr. CRAWFORD. Suppose they reject the second one? Then what happens? You see, I raise this question so we can get clear what you are driving at.

Mr. FARRINGTON. I see.

Mr. CRAWFORD. You have to keep it clear, and it is in the bill. You see, your second constitution, which is something that comes out of the prior rejection, has to be sent to the President of the United States for his approval. He comes into the picture where he can approve or disapprove.

And finally, a constitution is adopted, acceptable to the President of the United States, in general line with the bill, and approved by the people of Hawaii. And with all of that having been adopted, then the people of Hawaii, must elect two Members of the House, two Members of the Senate, the Governor, and other officials provided, must serve as a canvassing board, certify the legal election of these people, and after their election is certified, the President must proclaim that the State has qualified, and then they are eligible for taking their seats in the Senate and the House.

As Mr. Fernandez has pointed out, it may be months, it could be years, before this thing is finally ironed out, and Hawaii comes into actual statehood.

Mr. MURDOCK. It was 2 years in the case of the last State.

Mr. CRAWFORD. This bill we have before us sets up that machinery.

Mr. FERNANDEZ. Mr. Chairman, I ask to be excused, because of the fact, as I stated, that Mrs. Fernandez is going to the hospital this afternoon, and I have to be with her. I am sorry I have to leave.

I had hoped to be here and to have the opportunity of voting for this bill. I also regret I am leaving at the most interesting point of the bill.

The CHAIRMAN. We are sorry, and we all hope for Mrs. Fernandez' speedy recovery.

Mr. PEDEN. Mr. Chairman, I too find it necessary to leave at this time. I likewise, for the purpose of the record, wish to record the fact that I regret that I have to leave, and that I, too, am in favor of the passage of this bill.

Mr. BARTLETT. I would like to put a question to Mr. Crawford.

Does Congress take any further action after enactment of this bill?

Mr. CRAWFORD. No, sir. After having approved this bill, I am quite sure you will find this is correct, that this matter is then in the hands of the people of Hawaii, and the President of the United States, and they proceed to qualify it, and having qualified, Congress can't do a thing.

They come into the Union.

The CHAIRMAN. May I ask the gentleman from Colorado, Mr. Carroll, who could not be present for very substantial reasons at the last meeting, at the end of the 5-year period provided for in the bill, the title of lands in question, other than the lands set aside for military purposes, unless in the meantime Congress decides otherwise, will automatically go to the State of Hawaii.

Is that your understanding, Mr. Carroll?

Mr. CARROLL. Well, as I read this bill, that is the question I raise, whether or not this committee, by its act today, was actually saying in effect, "We are now letting these lands back to Hawaii, after a 5-year period."

The CHAIRMAN. Congress has the right within the 5-year period to decide otherwise. We keep title in the Federal Government.

Mr. CARROLL. Perhaps I am confused, Mr. Chairman, but as I read it, in effect, and I would like to have the gentleman correct me if I am wrong, as I read it, it is my impression that what we are saying, we own title to the land now, the United States Government.

We are saying in effect, we will give this back to the State of Hawaii in the event we do not act within 5 years.

The CHAIRMAN. That is right.

Mr. CARROLL. So, in effect now, we are letting the title away from us now, subject to action that may be taken by Congress.

The CHAIRMAN. We are not changing title. That will not change for a period of 5 years.

Mr. CARROLL. That is right. That is why I then raised the question by failure, not an affirmative act now, but by an act of omission we vest title within the State of Hawaii.

The CHAIRMAN. If you fail within 5 years.

Mr. REDDEN. I would like to raise one question. In view of what Mr. Crawford said about the time that might expire while Hawaii was deciding or voting upon whether she should become a State, and the President taking such action as the bill requires him to do, some 2 or 3 years of this time might elapse, which would permit the Congress perhaps only 2 years to make a decision as to whether it wanted to retain definitely the land referred to in this amendment.

Certainly the Congress would not, or the United States would not, undertake to make an investigation of the conditions described in this amendment until Hawaii voted upon whether it would come into the Union.

The point I am making is that I do not think 5 years is long enough in view of the fact that so many things can happen to take up a major portion of that 5 years before action or investigation is undertaken.

Mr. SANBORN. Could not the investigation continue now at the same time they are going through this process of deciding on the State?

It says, according to the language here, that it is to be done upon the enactment.

Mr. REDDEN. But you find this: The people of Hawaii, when they vote on this, would not know what the United States is going to do about it. They know just that they can do something within this period.

Now, it is the Government of the United States; is it going to send investigators there to determine this without knowing what Hawaii is going to do, whether Hawaii is going to accept it or not, or will the people of Hawaii accept it without knowing what the issue is?

Mr. D'EWART. I might say, for your information, that in discussing this amendment I am sorry Mr. Barrett is not here, because he sat in on the full discussion with Mr. Davidson, the Assistant Secretary. We discussed it several years and he agreed that 5 years would give them the time they needed to determine whether there was a possibility of irrigating some of this land.

Mr. REDDEN. Did he mean 5 years from the enactment of this bill?

Mr. D'EWART. From the time this bill is enacted by Congress. If you will read it carefully, it says that this committee shall go immediately and investigate this area, to see whether some of it is possible of irrigation.

Mr. REDDEN. The trouble with that word immediately is that it

Mr. D'EWART. I agree; but the idea was that it would be this summer when Congress was in recess.

Mr. MURDOCK. It seems it me that 5 years is long enough, because if we waited until statehood was accepted and Hawaii became a State, even then they would not know definitely what Congress was going to do about this question.

I want to emphasize the fact that this is a compromise between two extremes of view. There were some who thought that Hawaii ought to be like Texas, admitted and retain all of her public lands. There were others who took the view, quite the opposite, that all such public lands should remain with the Government; but that was contingent, since this is only a small bit of public land; it was contingent upon the question, what could be done with that land. I raised the question myself.

Is any of it fit for irrigation or agriculture on a large scale, and nobody could answer that. So the holding of the land as it is under this amendment for 5 years is simply giving Congress the time to investigate, and that investigation going forward just as soon as we see fit to do it.

Mr. ROCKWELL. Was it not true, Mr. Murdock, that the consensus of opinion seemed to be that the committee would like to give Hawaii the land?

Mr. MURDOCK. Yes, I believe that was the feeling.

Mr. ROCKWELL. And the Department of the Interior did not want to, and the proviso was that unless the Department could come in here and show that the Federal Government could reclaim it or do something with it, that we would give it to Hawaii, and therefore it is up to them to prove the Government needs the land.

Otherwise it would go the way we thought it should go. In other words, back to Hawaii.

Mr. MURDOCK. That was the sentiment, as I heard it.

The CHAIRMAN. It has been stated here, and by those who were in a position to know, that the amendment only affects about 300,000 acres, a part of which is wasteland. I say in fairness to the Department of the Interior, that the Department of the Interior did not give its approval to the so-called Barrett amendment.

Gentlemen, you have heard the motion to approve the amendment as read. Are you ready for the question?

All in favor of adopting the amendment signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The aye's have it. It is so ordered.

The clerk will read it.

Mr. GRANT. You want to adopt the amendment as amended?

The CHAIRMAN. In order to make it clear, we will now vote on the amendment as amended.

All in favor of adopting the amendment signify by saying "Aye." Counter minded "No."

(There was general response "Aye.")

The CHAIRMAN. The aye's have it. It is so ordered.

Mr. ROCKWELL. On pages 12 and 13, did we eliminate the seventh from eighth by the fact that we did not adopt it?

Mr. FARRINGTON. Mr. Chairman, I have two perfecting amendments at the lower part of page 13 that protect the title of the property of the United States.

On page 15, line 21, after the words "for the use of," insert, "The United States or."

The CHAIRMAN. You have heard the perfecting amendment.

All in favor signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. FARRINGTON. Page 15, line 25, after the words, become the property of," insert the words, "The United States or," the same character of amendment.

The CHAIRMAN. You have heard the amendment.

All in favor of adopting the amendment signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The aye's have it. It is so ordered.

Mr. FARRINGTON. On page 16, line 1, after the word, "subdivision," insert the words, "As the case may be."

The CHAIRMAN. You have heard the amendment.

All in favor of adopting the amendment signify by saying "Aye." Counter minded "No."

(There was general response "Aye.")

The CHAIRMAN. The aye's have it. It is so ordered.

Mr. FARRINGTON. Now, Mr. Chairman, I would like to return to page 12, and move that article seventh, beginning on line 17, and continuing through page 17 down to and including line 10, be stricken.

The CHAIRMAN. That will be including line 10?

Mr. FARRINGTON. Line 10 on page 13.

Mr. D'EWART. I believe you should change the word, "eighth" on line 11.

Mr. FARRINGTON. I was going to offer that next.

The CHAIRMAN. In marking up the bill the changes will be made.

You have heard the amendment. All in favor of adopting the amendment signify by saying "Aye." Counter minded "No."

(There was general response "Aye.")

The CHAIRMAN. The aye's have it. It is so orderd.

Mr. FARRINGTON. I move on page 13, line 11, "eighth" be changed to "seventh."

Mr. LEMKE. As I recall, the States of the Union have the right to do the very things to which you are trying to prohibit your new State. My own State has tried several times, but never adopted for taxing lands of absentee landlords higher than those that lived within the State.

I am not in favor of that as a rule, but is there any danger Hawaii would do that if we did not put that in?

Mr. FARRINGTON. That was an amendment offered by the Department of the Interior. We have no objection to it. We have relatively few absentee landlords in Hawaii.

Mr. LEMKE. You may all come over and be absentees.

Mr. FARRINGTON. I move that the word "eighth" be changed to "seventh," on line 11 of page 13.

The CHAIRMAN. You have heard the motion. All in favor of adopting the amendment signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The aye's have it. It is so ordered.

Mr. GRANT. Page 16, line 3.

Mr. D'EWART. Parliamentary inquiry. We have adopted a number of amendments to this amendment. Are there additional amendments to this amendment before we adopt the amendment's amendment?

Mr. GRANT. We adopted them.

Mr. FARRINGTON. It depends on what you call the amendment. As I have put these motions, they have covered the sections that have been read by the clerk.

Mr. D'EWART. I see.

Mr. FARRINGTON. After we adopted the amendment to paragraph (b) on page 15, and the perfecting amendments in the balance of that paragraph, I asked that we return back to pages 12 and 13, and I think the motions have been in order.

Mr. GRANT. They have all been adopted.

The CHAIRMAN. It is generally understood that after a bill is approved by a committee, certain perfecting amendments which do not change the text of a bill are always in order.

Proceed with the next amendment.

Mr. GRANT. Page 16, line 3:

(c) The State of Hawaii, upon its admission to the Union, shall be entitled to select, and the Secretary of the Interior is authorized and directed to issue patents to said State for, one hundred and eighty thousand acres of public lands, as that term is defined in section 73 (a) of the Organic Act of Hawaii (42 Stat. 116, 48 U. S. C., sec. 663), within the boundaries of said State. The selection of such lands by the State of Hawaii shall be made and completed within five years from the admission of said State into the Union. The lands so selected shall be in lieu of any and all grants provided for new States by provisions of law other than the Act, and such grants shall not extend to the State of Hawaii.

Do you want to adopt that?

Mr. FARRINGTON. I move the amendment be adopted.

Mr. D'EWART. Second the motion.

The CHAIRMAN. You have heard the motion. All in favor of adopting the amendment signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. GRANT (reading):

(d) The lands patented to the State of Hawaii pursuant to the preceding subsection, together with the proceeds thereof and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on a widespread a basis as possible, and for the making of public improvements. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part, out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands patended under the preceding subsection shall be used for the support of any sectarian school, college, or university

Mr. FARRINGTON. I move the adoption of the amendment as read.

Mr. SANBORN. Second.

The CHAIRMAN. Gentlemen, you have heard the motion. All in favor of adopting the amendment signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

The clerk will proceed.

Mr. GRANT (reading):

(e) Upon the admission of the State of Hawaii into the Union the lands and other public property of the United States within said State shall, subject to the other provisions of this Act, continue to be administered in accordance with the laws applicable thereto immediately prior to the admission of said State, until otherwise provided by the Congress: *Provided, however*, That all powers and duties conferred by such laws upon any officer of the Territory of Hawaii, with respect to any of such lands or other property except lands and property used in the administration of the Hawaiian Homes Commission Act, 1920, as amended, shall vest in the Secretary of the Interior and be administered, subject to his supervision and direction, in the Department of the Interior. Upon the application of the State of Hawaii the said Secretary may, in his discretion, withdraw public lands within said State for administration as Hawaiian home lands and release Hawaiian home lands of equal value for administration as public lands.

Mr. FARRINGTON. Mr. Chairman, I move that section be stricken. That paragraph, and the paragraph which follows, "f," have all been covered in the amendment which we previously discussed.

The CHAIRMAN. You have heard the motion. All in favor of adopting the amendment signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. GRANT. Section (f):

All moneys derived by the United States after the admission of the State of Hawaii into the Union from the sale, lease, or other disposal of public lands, as that term is defined in section 72 (a) of the Organic Act of Hawaii (42 Stat. 116, 48 U. S. C., sec. 663), within the boundaries of said State shall, until otherwise provided by the Congress, be distributed as follows:

(1) Thirty-seven and one-half per centum to the State of Hawaii to be used solely for the benefit of the inhabitants thereof, for educational and other public purposes, as the legislature of said State may direct;

(2) Fifty-two and one-half per centum to the reclamation fund created by the Federal reclamation laws; and

(3) Ten per centum to the miscellaneous receipts of the Treasury of the United States.

The foregoing distribution shall be in lieu of any and all existing provisions of law, except as otherwise provided herein, authorizing the payment to, or retention by, the Territory of Hawaii of moneys derived from lands or other property belonging to the United States, and such provisions shall cease to be effective upon the admission by the State of Hawaii, except with respect to lands selected by, but not yet patented to, said State pursuant to this section, and except with respect to Hawaiian home lands as provided in section 3.

Mr. FARRINGTON. I move that amendment be rejected, Mr. Chairman.

The CHAIRMAN. Gentlemen, you have heard the motion. All in favor of adopting the motion signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. FARRINGTON. Mr. Chairman, I now move that on page 19, line 4, "g" be changed to "e" to conform with the amendments just adopted.

Mr. DAWSON. I second the motion.

The CHAIRMAN. All in favor of adopting the motion signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. GRANT. Page 20, line 6, delete what is marked in the record through line 13, and in lieu thereof, line 14:

The said canvassing board shall forthwith certify the result of said election to the Governor of said Territory, together with a statement of the votes cast upon the question of ratification or rejection of said constitution, also a statement of the votes cast for or against such provisions thereof as were separately submitted to the voters at said election, and for or against said ordinances. If a majority of the legal votes cast at said election shall reject the constitution, the——

Then it goes on as in the original bill.

Mr. FARRINGTON. I move the adoption of the amendment, as read.

The CHAIRMAN. You have heard the motion. All in favor of adopting the amendment signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. FARRINGTON. Mr. Chairman, on page 25, line 12, after the period, insert the words, "Representation of the State of Hawaii, in the House of Representatives, shall be without regard to the existing apportionment of Congress in said House, and the number of Members thereof until such time as a reapportionment of the Congress shall be provided for by law."

Mr. GRANT. Mr. Chairman, just before the committee met, the Chief of the Legislative Drafting Service was over to see me about that amendment, in accordance with telephone requests that had been made by the chairman, and he said that it cannot be adopted in exactly that language.

He will have to draft the language. But the thought is that under the Reapportionment Act, there is a limitation of 435 Members in Congress. It will be necessary to increase the number to 437 by amending that act; then grant these two additional Members to Hawaii, until the next reapportionment of Congress takes place, which will be the Eighty-third Congress, when Hawaii will be reapportioned its representation in Congress, the same as any other State in the Union.

It may have one Member, or it may have three. So that the perfecting language will have to be drafted for that.

The CHAIRMAN. Some of us have been disturbed by reason of the increase of membership of the House that will be necessitated upon entry of Hawaii into Statehood. Did the drafting expert give you a written statement?

Mr. GRANT. Not yet. He has not had time, sir. He just got the matter cleared about 10 minutes of 2, and he will draft it as soon as he can, but he pointed out that very often the procedure of committees has permitted the adoption of the principle, subject to the drafting service carrying that principle into legal terminology, and that it can be handled that way.

Mr. FARRINGTON. I move the adoption of that amendment with that understanding, Mr. Chairman.

Mr. D'EWART. I second the motion.

The CHAIRMAN. Before putting the motion, is it understood that we will have the Legislative Counsel provide the proper language before the bill is sent to the House?

Mr. FARRINGTON. Yes. That is my understanding.

Mr. MURDOCK. May I ask a couple of questions there? What is the present population of Hawaii?

Mr. ANTHONY. 502,000.

Mr. MURDOCK. 502,000, according to the last census?

Mr. FARRINGTON. I beg to inform you that Mr. Houston, who arrived from Honolulu 3 days ago, says it is 519,000. His information is a little later than mine.

Mr. MURDOCK. However, that does not reach twice the present ratio of representation. I was on the Committee on Census at the last census taken, and I found great opposition to increasing the membership of the House.

We are apt to run into that. So far as I am personally concerned, I should like to see two Members of the House from Hawaii right from the start, but there will be some question raised about it, possibly.

The CHAIRMAN. As I understand it, the increase of two would only last until the next census and the next reapportionment. Am I right?

Mr. FARRINGTON. That is right.

Mr. CRAWFORD. Mr. Chairman, on this point, if there is no objection, I think we ought to adopt unanimously the proposal of the Chairman, working with the legislative drafting service, be permitted to have this language brought up and inserted in the bill without referring it back to the committee, carrying out the intention of the amendment.

Mr. FARRINGTON. I second the motion.

The CHAIRMAN. You have heard the motion, including the amendment offered by the gentleman from Michigan, Mr. Crawford. All in favor signify by saying "Aye." Counterminded "No."

(There was a general response "Aye.")

The CHAIRMAN. The aye's have it. It is so ordered.

Mr. GRANT. Page 27, line 25. Insert:

All civil cases of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Hawaii in like manner, to the same extent, and with the right of appellate review, as if said State had been created and said courts had been established prior to the accrual of such causes of action or the commission of such offenses; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Hawaii.

Mr. FARRINGTON. I move the adoption of the amendment, Mr. Chairman.

Mr. LEFEVRE. I second the motion.

The CHAIRMAN. You have heard the amendment. All in favor of adopting the amendment signify by saying "Aye." Counterminded "No."

(There was general response "Aye.")

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. GRANT. Page, line 8, add a new section, 15:

The provisions of the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irigation works for the reclamation of arid lands," approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, herein referred to as the Federal reclamation laws, are hereby extended so as to include and apply to the Territory of Hawaii from and after the date of the approval of this act, and to the State of Hawaii from and after the date of its admission to the Union: *Provided, however*, That the provisions of said laws which require moneys received from the sale and disposal of public lands, or other moneys derived from public lands, to be covered into the reclamation fund shall not include or apply to any lands within said Territory or State other than lands set aside reserved, or withdrawn for the purposes of said laws. There are hereby reserved to the United States all rights and powers for the carrying out by the United State of the provisions of the Federal reclamation laws as hereby extended, and such rights and powers shall continue after the admission of said State to the same extent as if it had remained a territory.

Mr. FARRINGTON. Mr. Chairman, I move that amendment be deleted.

Mr. ENGLE. I second the motion.

Mr. FARRINGTON. That is in line with previous action of the committee.

The CHAIRMAN. You have heard the motion. All in favor signify by saying "Aye." Counterminded "No."

(There was general response "Aye."

The CHAIRMAN. The ayes have it. It is so ordered.

Mr. GRANT. Page 31, section 16:

Notwithstanding the admission of the State of Hawaii into the Union, the United States shall continue to have sole and exclusive jurisdiction over the area which may then or thereafter be included in Hawaii National Park, saving, however, to the State of Hawaii the same rights as are reserved to the Territory of Hawaii by section 1 of the act of April 19, 1930 (46 Stat. 227), and saying, further, to persons then or thereafter residing within such area the right to vote at all elections held within the political subdivisions where they respectively reside. Upon the admission of said State all references to the Territory of Hawaii in said act or in other laws relating to Hawaii National Park shall be deemed to refer to the State of Hawaii.

Mr. FARRINGTON. Mr. Chairman, I move the adoption of the amendment, and that is that with the amendment of the word, "16" be changed to "15."

Mr. MURDOCK. I second the motion.

The CHAIRMAN. You have heard the amendment, including the perfecting amendment, changing the number from 16 to 15.

All in favor signify by saying "Aye." Counter minded "No." The aye's have it. It is so ordered.

Mr. FARRINGTON. If I may, I have two minor perfecting amendments; section 17 should be changed to section 16, on page 31.

The CHAIRMAN. You have heard the amendments. All in favor of adopting them signify by saying "Aye." Counter minded "No."

(There was general response "Aye.")

The CHAIRMAN. The aye's have it. It is so ordered.

Mr. FARRINGTON. Mr. Chairman, on page 16, line 7, the amendment reads, "Organic Act of Hawaii." It should read, "The Hawaiian Organic Act." It is an error in draftsmanship.

The CHAIRMAN. You have heard the perfecting amendment. All in favor, signify by saying "Aye." Counter minded "No."

(There was general response "Aye.")

The CHAIRMAN. The aye's have it. It is so ordered.

Mr. FARRINGTON. Mr. Chairman, I now move that H. R. 49 be amended, striking out all after the enacting clause, and substituting therefor the amendments as amended that have been adopted by the committee today, from the committee print of March 15.

Mr. DAWSON. I second the motion.

Mr. MURDOCK. Can that be done and introduced as a clean bill without giving us a new number? I was a little worried about that under our rules.

Mr. FARRINGTON. The parliamentarian informs me that what will happen will be that the bill will be introduced with the original H. R. 49 appearing in the first part of the bill, with the lines through it, and the new bill in italics following it. There is some word to describe that particular typographical form that I do not recall.

The CHAIRMAN. Are you ready for the motion? All in favor of the motion by the gentleman from Hawaii will signify by saying "Aye." Counter minded "No."

(There was general response "Aye.")

The CHAIRMAN. The aye's have it. It is so ordered.

Mr. GRANT. That was a unanimous vote, was it not, Mr. Chairman?

Mr. FARRINGTON. Mr. Chairman, did that cover the reporting of the bill?

I move now that H. R. 49 as amended be reported and that the chairman be requested or instructed to obtain a rule necessary for prompt consideration by the House.

Mr. ENGLE. I second the motion.

The CHAIRMAN. Is a roll call needed? I observe a quorum present, so I will put the motion. All in favor signify by saying "Aye." Counter minded "No."

(There was a unanimous response "Aye.")

The CHAIRMAN. The aye's have it. It is unanimously so ordered.

(Whereupon, at 4:04 p. m., the committee adjourned.)

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